

Employing the Presidential Executive Order and the Law to Provide Integrated Conflict Management Systems and ADR Processes: The Proposed National Employment Dispute Resolution Act (NEDRA)

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- I. Introduction
- II. Overt vs. Unconscious and Subtle Discrimination
 - A. Research on Covert and Modern Discrimination
 - B. Unconscious Discrimination
 - C. Subtle Discrimination
- III. Factual Realities of Enforcement of Statutory Discrimination Laws
- IV. The Legal and Public Policy Context of ADR: ADR in the Workplace at a Crossroads
 - A. Self-Regulation of the U.S. Workplace
 - B. Integration of Title VII and The ADEA in the Workplace
 - 1. *Alexander v. Gardner-Denver Co.*
 - 2. *Gilmer v. Interstate/Johnson Lane Corp.*
 - 3. *Circuit City v. Adams*
 - 4. *14 Penn Plaza LLC v. Pyett*

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- C. Governmental Endorsement of Discrimination Statutes and ADR in the Workplace
 - 1. EEOC ADR Statement of 1995
 - 2. ADR Act of 1998
 - 3. NLRB Deferral Policies
- V. The Potential Utility of Private Statutory Tolling Agreements
 - A. Private Statutory Tolling Agreements and Organizational Diversity Policies
 - B. The Essential Elements of Private Statutory Tolling Agreements
 - C. Private Statutory Tolling Agreements
- VI. National Employment Dispute Resolution Act (NEDRA)
 - A. Rationale Behind NEDRA
 - B. Goals and Objectives of NEDRA
 - C. Benefits of NEDRA
 - D. Mandated vs. Voluntary Participation
- VII. Strategic Enactment of National Employment Dispute Resolution Act Strategies
 - A. Experiential-Based Rationale for NEDRA and the Role of Politics
 - B. Congressional Legislation and the Presidential Executive Order
- VIII. The National Employment Dispute Resolution Act Model and the “Early Resolution of Veterans Disability Based Reasonable Accommodation Requests”
 - A. The Theoretical Utility and Application of NEDRA
 - B. The Applied and Practical Utility of NEDRA; Carey Salt Company Case
 - C. The View of Veterans For Commonsense and the Utility of NEDRA
- IX. Summary and Conclusions
- X. Appendices
 - A. An Example of a Model Private Statutory Tolling Agreement
 - B. Draft National Employment Dispute Resolution Act

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

I. INTRODUCTION

When Sigmund Freud was once asked what the most important thing in life was, he responded: "Love and work."¹ Similarly, Shakespeare once said "You take my life when you take the means whereby I live."² When read together, the quotes of Sigmund Freud and William Shakespeare underscore the importance of work, particularly the loss of work due to race-based discrimination.³ These statements further underscore the importance of laws and public policies that are designed and intended to prohibit workplace discrimination based on immutable characteristics such as race, sex, national origin, religion, disability, age, marital status, and sexual orientation.⁴

The first purpose of this article is to provide the reader with a "mini-primer" on the history and overview of the use of private conflict management systems and alternative dispute resolution ("ADR") processes such as labor and employment arbitration and mediation within the context of resolving race- or ethnicity-based discrimination in the workplace.⁵

The second purpose of this article is to introduce the relatively recent concepts of "modern racism or discrimination," "unconscious," and "subtle discrimination" in the workplace. The third purpose is to discuss a number of the realities related to the current way Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, and Section 1981 of the Civil Rights Act of 1866 are being enforced, and how the various courts of appeal are

¹ MARK A. ROTHSTEIN, ANDRIA S. KNAPP & LANCE LIEBMAN, *EMPLOYMENT LAW: CASES AND MATERIALS* 21 (1987).

² *Id.*

³ *See generally, e.g.*, WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (2d ed. 1992).

⁴ *See generally* DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES (Robert L. Dipboye & Adrienne Colella eds., 2005) (explaining the various types of discrimination and how discrimination works). Although the focus of this article is primarily on race- or ethnic-based discrimination, the discussions, concerns, and recommendations are in many instances applicable to members of other protected groups. The proposed National Employment Dispute Resolution Act would also apply to members of other protected groups and covers claims such as sexual and racial harassment.

⁵ *See* DICTIONARY OF CONFLICT RESOLUTION (Douglas H. Yarn ed., 1999) (providing definitions of conflict resolution and ADR terms). *See also* David A. Hoffman, *The ABC's of ADR: A Glossary of Dispute Resolution Methods*, Mass. Lawyers Weekly, Sept. 6, 1993, at 115-18; HENRY S. KRAMER, *ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE* (1998) (outlining workplace dispute resolution).

reversing a disproportionately greater number of verdicts favorable to plaintiffs than appealed cases of respondent employers.

The fourth purpose is to provide the reader with the legal and ADR public policy context within which employment discrimination disputes have been and are currently being resolved, pursuant to relevant court decisions, policies, and protocols implemented by the EEOC, the federal courts, and private employers. This includes the Supreme Court's decisions in *Alexander v. Gardner-Denver*, *Gilmer v. Interstate Johnson/Lane*, *Circuit City, Inc. v. Adams*, and *14 Penn Plaza LLC v. Pyett*.⁶

Lastly, with this background and through this experiential-based prism, the authors recommend the enactment of legislation entitled the "National Employment Dispute Resolution Act" (NEDRA). NEDRA would require certain covered federal contractors and recipients of federal funds to implement legitimate internal conflict management systems designed to afford EEO/employment disputants early access to ADR processes such as ombudspersons, private fact-finders, and mediators. Because NEDRA would apply to certain federal contractors and recipients of federal funds, the authors further propose that NEDRA be enacted as a Presidential Executive Order.⁷

⁶ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009).

⁷ See, e.g., Kenneth R. Mayer & Kevin Price, *Unilateral Presidential Powers: Significant Executive Orders, 1949-99*, 32 *Presidential Studies Quarterly* 367, 367-386 (2002); see generally KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWERS (2002); DAVID MCCULLOUGH, TRUMAN (1992); RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); Phillip J. Cooper, *By Order of the President: Administration by Executive Order and Proclamation*, 18 *ADMIN. & SOC'Y* 233, 233-62 (1986); Christopher J. Deering & Forrest Maltzman, *The Politics of Executive Orders: Legislative Constraints on Presidential Power*, 52 *POL'Y RES. Q.* 767, 767-783 (1999); Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 *Laws and Contemporary Problems* 1, 1-45 (1976); W. Andrew Jack, *Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 *GEO. WASH. L. REV.* 512, 512-40 (1985); George A. Krause & David B. Cohen, *Presidential Use of Executive Orders, 1953-1994*, 25 *AM. POL. Q.* 458, 458-71 (1997); Kenneth R. Mayer, *Executive Orders and Presidential Power*, 6 *J. OF POLITICS* 445, 445-66 (1999); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 *J.L. ECON. & ORG.* 132, 132-79 (1999); William D. Neighbors, *Presidential Legislation by Executive Order*, 37 *U. COLO. L. REV.* 105, 105-18 (1964); Morton Rosenberg, *Beyond*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

II. OVERT VS. UNCONSCIOUS AND SUBTLE DISCRIMINATION

As we enter the early part of the twenty-first century, it is fair to say that generally blatant forms of race-based discrimination are not condoned either by statute or by “fair-minded people.”⁸ One of the primary purposes of Title VII was to define what constituted unlawful race-based discrimination, as well as to establish the sanctions against employers, employment agencies, and labor organizations that engage in such unlawful behavior.⁹ Thus, it is also fair to assert that Title VII, by force of law, was designed to change behavior and possibly attitudes about the hiring and treatment of racial minorities in the workplace. It is, however, subject to debate as to how well the EEOC and the courts have performed in the actual effectuation of Title VII, or what Professor Alfred Blumrosen calls “in the transmission of law.”¹⁰

the Limits of Executive Power: Presidential Control of Agency Rulemaking under Executive Order 12,291, 80 MICH. L. REV. 193, 193–247 (1981); PETER W. SPERLICH, BARGAINING AND OVERLOAD: AN ESSAY ON PRESIDENTIAL POWER, IN THE PRESIDENCY 168 (Aaron Wildavsky ed., 1969); Margaret Weir, *Ideas and Politics: The Acceptance of Keynesianism in Britain and the United States*, in *The Political Power of Economic Ideas: Keynesianism Across Nations* 53 (Peter A. Hall ed., 1989); Robert B. Cash, Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME L. REV. 44, (1963); Editorial, *Government by Executive Order*, Wash. Times, July 8, 1998, at A18; Elizabeth Shogren, *Clinton to Bypass Congress in Blitz of Executive Orders*, L.A. TIMES, July 4, 1998, <http://articles.latimes.com/1998/jul/04/news/mn-608>.

⁸ An examination of court decisions favorable to Title VII plaintiffs is evidence that overt or blatant discrimination still occurs today. See, e.g., Bari-Ellen Roberts, *Roberts vs. Texaco: A True Story of Race and Corporate America* (1998); see also Douglas A. Blackmon & Nicole Harris, *Racial Bind: Black Utility Workers in Georgia See Nooses As Sign of Harassment*, Wall St. J., April 2, 2001, at A-1, A-8; Correspondents of the New York Times, *How Race Is Lived In America: Pulling Together, Pulling Apart* (2001); BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* (1995).

⁹ See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201–07 (1979) (discussing the legislative history of Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (“The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”).

¹⁰ See ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* (1993) (pointing out that although *Brown v. Board of Education* was decided in 1954, with the Supreme Court ordering integration of the public schools “with all deliberate speed,” to date the schools in Topeka remain segregated and the enactment of laws and many court decisions are not important (symbolic) unless they “effectuate change” or actually implement the policy or purpose behind such public policies).

Notwithstanding, as evidenced by the Supreme Court's decision in *Brown v. Board of Education*,¹¹ the enactment and enforcement of various civil rights laws have brought about varying degrees of social change in our country.¹² One should be mindful of this reality and not unwittingly dismiss or discount the work of such early civil rights pioneers as Wiley Branton, Charles Hamilton Houston, Thurgood Marshall, Dorothy Height, and John Lewis.¹³

When the outside observers Alexis De Tocqueville and Gunnar Myrdal visited this country during the early 19th and 20th centuries, respectively, the forms or types of discrimination that they observed were manifestations of a consciously and de jure racially segregated society.¹⁴ A society in which overt forms of both race and gender-based discrimination was commonplace and, in fact, often existed by law.¹⁵

Indeed, many individuals today can recall when the concepts and practices of "female jobs" and "male jobs"¹⁶ and "Negro jobs" and "white jobs"¹⁷ were the order of the day. Many also remember when there were no

¹¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹² See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

¹³ See generally JUAN WILLIAMS, *MY SOUL LOOKS BACK IN WONDER: VOICES OF THE CIVIL RIGHTS EXPERIENCE* (2004).

¹⁴ See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Richard D. Heffner ed., 1956); GUNNAR MYRDAL, 1 *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1962) [hereinafter *Myrdal Vol. 1*]; 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1962) [hereinafter *Myrdal Vol. 2*]; ARNOLD ROSE, *THE NEGRO IN AMERICA: THE CONDENSED VERSION OF GUNNAR MYRDAL'S AN AMERICAN DILEMMA #* (1964); LEO KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969); JUDITH A. BAER, *THE CHAINS OF PROTECTION: THE JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION* (1978).

¹⁵ *Id.*

¹⁶ See *Muller v. State of Or.*, 208 U.S. 412, 422-23 (1908) (upholding the constitutionality of state labor protective laws which effectively discriminated against women as a class and is often viewed as creating a "major barrier" to women's rights in the workplace and permitted the perpetuation of "male jobs" and "female jobs").

¹⁷ See *Dred Scott v. Sandford*, 60 U.S. 393, 405-06 (1856) (having a similar effect to that of *Muller v. State of Oregon* only in permitting "white jobs" and "Negro jobs"); see also *Plessy v. Ferguson*, 163 U.S. 537, 563-64 (1896). For a more extensive reading in this area, see WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* (1977). See also HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: I. RACE, WORK AND THE LAW* (1977); *Myrdal Vol. 1*, *supra* note 14, at 281; *Myrdal Vol. 2*, *supra* note 14, at 287; Rose, *supra* note 14, at 102; Derrick Bell, *Slavery and American Law*, in *RACE, RACISM AND AMERICAN LAW* (6th

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

federal statutes in existence to prohibit age and disability-based discrimination, much less public policy prohibiting discrimination against sexual orientation or genetic-based discrimination.¹⁸

In retrospect, as a civilized society, this country has come a long way on the heels of a number of national public policies and laws that compel the inclusion and integration in the workplace of many formerly excluded members of various demographic groups. We should be ever mindful that these changes—particularly integration—came about due to the compulsion of the law and court decisions, and were not due to the voluntary behavior or “interest convergence”¹⁹ of employers and labor organizations.

Notwithstanding these advances brought about by workplace civil rights laws, incidents of sexual and racial harassment and discrimination continue today.²⁰ Thus, in many ways, private internal conflict management systems and ADR processes may also serve as effective tools and mechanisms to further effectuate U.S. civil rights laws and to better manage a diverse workforce. The role of the law and the courts in integrating our society and the workplace is a reality that might not be fully appreciated today.

However, the challenge facing our society in the twenty-first century is not solely identifying and eliminating the blatant or overt forms of

ed., 2008); Arthur Ross, *The Negro in the American Economy*, in *Employment, Race and Poverty* (Arthur Ross & Herbert Hill eds., 1967). *See generally* *Employment, Race and Poverty* (Arthur M. Ross & Herbert Hill eds., 1967); *The Negro and the American Labor Movement* (Julius Jacobson ed., 1968).

¹⁸ *See* Kathleen Zeitz, *Employer Genetic Testing: A Legitimate Screening Device or Another Method of Discrimination?*, 42 LAB. L. J. 230 (1991); Edith F. Canter, *Employment Discrimination Implications of Genetic Screening in the Workplace Under Title VII and the Rehabilitation Act*, 10 AM J.L. & MED. 323 (1984). *See also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (endorsing the theory of disproportionate effect or disparate impact). *See generally* Karen Moulding, *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg ed., 2008) (Arguably, genetic testing could have a disparate impact on racial and ethnic minorities).

¹⁹ *See* Derek A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528–534 (1979) (discussing various interest-convergence remedies in *Brown*).

²⁰ *See* Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 19 (2008) (“Undeniably, Americans have made tremendous progress with regards to attitudes about race and gender in the past several decades. This progress, however, has occurred primarily at a surface level within society. Research on implicit attitudes, which are judgments that are automatically activated without a person's awareness or intention, suggests that negative, stereotypical attitudes about Blacks and women are still pervasive.”).

discrimination observed by Alexis de Tocqueville and Gunnar Myrdal.²¹ Rather, the real challenge facing our society is how to deal effectively, equitably, and fairly with two other forms of discrimination: “unconscious discrimination” and “subtle discrimination.” Harvard Professor and psychiatrist Chester Pierce was one of the first scholars and observers to recognize the phenomenon of unconscious discrimination and its damaging cumulative effect on individual victims.²² Professor Pierce referred to these forms of discrimination as “micro-aggressions.”²³ MIT Professor and ombudsperson Mary P. Rowe, building upon Professor Pierce’s theory of “micro-aggression,” subsequently coined the terms “micro-inequities” and “subtle discrimination.”²⁴

Continued incidents of hate crimes, police profiling, and other documented acts of overt discrimination in the workplace belie the notion that overt and blatant discrimination has ceased to exist in our society today. However, instances of unconscious and subtle discrimination often serve as the basis for many, if not most, contemporary claims of workplace discrimination.²⁵ Because these forms of discrimination are very difficult to prove, claims stemming from unconscious and subtle discrimination are, while actionable in fact, arguably not actionable in practice under our various federal and state anti-discrimination laws.²⁶ Consequently, ADR processes should, as a matter of public policy, be used as effective tools to resolve these claims of unconscious and subtle employment discrimination at the earliest practicable stages of a dispute. These processes may also be effective tools in inhibiting employment decisions unconsciously based on stereotypes.²⁷

²¹ See DE TOCQUEVILLE, *supra* note 14; Myrdal Vol. 1, *supra* note 14.

²² See, e.g., Chester Pierce, *Offensive Mechanisms*, in THE BLACK SEVENTIES 265, # (Floyd B. Barbour ed., 1970).

²³ See *id.* at 266, 271, 280.

²⁴ Mary P. Rowe, *Barriers to Equality: The Power of Subtle Discrimination to Maintain Unequal Opportunity*, 3 EMPLOYEE RIGHTS & RESPONSIBILITIES J. 153, 155 (1990) [hereinafter *Barriers to Equality*].

²⁵ *Id.* at 158–59.

²⁶ *Id.* at 162.

²⁷ See, e.g., Donald B. Reder, *Mediation as a Settlement Tool for Employment Disputes*, 43 LAB. L.J. 602 (1992); See also Robert A. Baruch Bush, “What Do We Need a Mediator For?”: *Mediation’s “Value-Added” for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1, 14–15 (1996).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

A. Research on Covert and Modern Discrimination

The book *Prejudice, Discrimination, and Racism*²⁸ describes experiments examining the “causes and consequences of contemporary forms of prejudice, discrimination, and racism.”²⁹ According to John F. Dovidio and Samuel L. Gaertner, although the percentage of whites with overt racist prejudices against blacks dropped dramatically between 1933 and 1988, “even whites who consider themselves to be liberal and egalitarian on race issues harbor unconscious racist attitudes and behave in racist fashion toward blacks.”³⁰ They often are unaware that their responses are race-based.³¹ “[T]his form of racism, identified as ‘aversive racism,’ results from whites’ assimilation of an egalitarian value system with ‘impressions derived from human cognitive mechanisms that contribute to the development of stereotypes and prejudice, and . . . feelings and beliefs derived from historical and contemporary cultural racist contexts.’”³²

In another study, Dovidio and Gaertner found that there was a difference between whites’ conscious and unconscious attitudes:

Even unconsciously, positive characteristics were associated more with whites than with blacks. For the negative traits, however, there was a discrepancy between unconscious and conscious responding. Specifically, negative characteristics were responded to significantly faster following a black prime than following a white prime. Thus, even though at a conscious level whites reject negative attributions of blacks, at an unconscious level they do have negative associations. This study therefore provides direct support for our assumption that people who consciously and genuinely embrace egalitarian ideals may, *out of their awareness*, still harbor negative feelings toward blacks.³³

²⁸ JOHN F. DOVIDIO & SAMUEL L. GAERTNER, *PREJUDICE, DISCRIMINATION, AND RACISM* (1986).

²⁹ *Id.* at 18.

³⁰ Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 426 (1999) [hereinafter *!Viva La Evolucion!*].

³¹ *Id.*

³² *Id.*

³³ *Id.* at 427. See also John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice*, in *OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA* 119, 138 (Harry J. Knopke, Robert J. Norrell & Ronald W. Rodgers eds., 1991).

According to Professor Ann C. McGinley, the research of Professors Dovidio and Gaertner:

strongly suggests that whites act on these unconscious negative feelings when they are able to justify their actions. For example, in one experiment Dovidio and Gaertner created an “emergency” situation in which black and white victims asked white bystanders for help. They found that whites normally helped black victims slightly more than white victims if there was no one else present to help. Whites’ helping behavior toward black victims dropped dramatically, however, in situations where another potential helper was present. Where others were present, whites helped black victims only about half as often as white victims . . . where there were no others present, whites could generally not refuse to help blacks without damaging their egalitarian self-image because there was no non-discriminatory reason for the failure to help.

Similar results occurred in tests conducted by Professors Katz, Wackenhutt and Glass. Their experiments demonstrated that white subjects reacted more strongly toward blacks than toward whites depending on the situation. For example, Katz instructed white male college students to give electric shocks for errors made by white or black students working at learning a task. White students who administered the shocks could choose between administering a mild or a severe shock. While explaining their reasons for selecting the more severe shock, white students described the black students receiving the severe shock in a much more derogatory fashion than they rated their white counterparts.³⁴

There is not a universal school of thought explaining the nature of prejudice or for that matter unconscious discrimination. This phenomenon might explain the disparity with which black workers view their general and anticipated treatment in the workplace, and might also serve as the basis for many, if not most, complaints of discrimination.

Those who are interested and committed to promoting the early resolution of claims based on discrimination—unconscious or conscious—ought to agree at this point that it is important to understand the concept and phenomenon of unconscious discrimination and how it works. Such an understanding might serve to prevent the filing of a number of EEO claims and better inform supervisors and managers, human resources professionals, employment lawyers, and even mediators and arbitrators of their unconscious biases. An understanding of unconscious and subtle discrimination may also

³⁴ *!Viva La Evolucion!*, *supra* note 30, at 427–28.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

serve to better effectuate the purpose of Title VII and the Civil Rights Act of 1991.

B. Unconscious Discrimination

Unconscious discrimination has been the focus of considerable scientific research.³⁵ The existence of this phenomenon is generally not known by most people and thus not appreciated by the majority of individuals, including human resources professionals, employment lawyers, and mediators. However, the effects of unconscious discrimination are very well known by racial minorities and in many instances women.

As is the case with subtle discrimination, the often profound consequences of unconscious discrimination are just as damaging to the victim as are the consequences of overt discrimination. In fact, the argument can be made that because unconscious and subtle discrimination are by definition often unintentional, it is worse than overt discrimination which is definitively actionable. A victim of unconscious and/or subtle discrimination often has very little, if any, redress except where employers have implemented internal conflict management systems to deal with claims of unfairness and general harassment.

There is a considerable amount of scientific research and a number of studies related to the nature of prejudice and, specifically, unconscious discrimination. One of the most informed articles about unconscious discrimination was authored by Professor Ann C. McGinley in “*Viva a Evolucion!: Recognizing Unconscious Motive in Title VII.*”³⁶ In this article,

³⁵ See, e.g., Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY AND SOC. PSYCHOL. 1464 (1998) (presenting research designed to evaluate “the IAT method’s usefulness for measuring evaluative associations that underlie implicit attitudes”).

³⁶ See Lamont E. Stallworth et al., *Discrimination in the Workplace: How Mediation Can Help*, 56 DISP. RESOL. J. 35, 37–43 (2001) (arguing that “C” charges should be mediated rather than just dismissed because they could involve unconscious discrimination); see Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 589–92 (noting that the litigation process is an unrealistic option for plaintiffs). See generally *Viva La Evolucion!*, *supra* note 30; see also Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1009 (1997) (discussing “A new conceptual framework for approaching the question of race-based and race-neutral decision making,”) [hereinafter *Emerging Cronyism*]; Charles R. Lawrence III, *The Id, the Ego,*

Professor McGinley describes the phenomenon of unconscious discrimination:

Persons whose acts result from bias and prejudice are often unaware of their subconscious motivations. Thus, it is likely that differential treatment of a female or minority employee in the workplace is because of his race or her gender, even though the employer is unaware that race and gender motivated the differential treatment. A[n] [evidentiary] rule limiting the definition of discrimination to cases where the employer consciously treated an employee differently because of membership in a protected class ignores the social science evidence [related to unconscious discrimination] and narrows the effectiveness of the statute [i.e., Title VII].

[T]he proof mechanisms serve the role of determining causation rather than conscious intent, assuring that the underlying employment decision is made because of the employee's protected characteristic, either with or without the employer's conscious awareness.³⁷

According to Professor McGinley, this created a "dislocation between theoretical justifications for the proof mechanisms designed to identify conscious discriminatory intent and the reality that these mechanisms could also identify unconscious discrimination."³⁸ Professor McGinley criticizes and refers to this dislocation as a "counter evolution," "resulting in a conservative shift in proof and evidentiary standards."³⁹ In short, the "counter evolution" theory is "based on a concept of discrimination narrowly limited to consciously discriminatory acts."⁴⁰

Thus, the tension created between the admissibility and consideration of social science evidence related to unconscious discrimination and traditional

and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 329–30 (1986) (describing how discrimination laws fail to deal with the realities of unconscious racism); Jessie Allen, Note, *A Possible Remedy for Unthinking Discrimination*, 61 BROOK. L. REV. 1299, 1299–1304 (1995) (asserting that the failure of civil rights laws is related to the reluctance to expand the definition of discrimination to include an objective standard that would address unconscious use of stereotypes).

³⁷ *!Viva La Evolucion!*, *supra* note 30, at 418–19.

³⁸ *Id.* at 419.

³⁹ *Id.*

⁴⁰ *Id.*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

legal evidentiary standards is often at the “unspoken heart” of many EEO disputes and invariably influences settlement decisions.⁴¹

Professors C. Neil Macrae, Galen Bodenhausen, and Alan B. Milne believe that one role a workplace neutral can play is to assist the decisionmaker in becoming aware of his or her biases.⁴² Whether unconscious or subtle, studies have found that the “heightened self-focus” of an evaluator (i.e., the alleged perpetrator) whose personal standards conflict with negative cultural stereotypes will permit the evaluator to inhibit the activation of the stereotype and to make decisions based on his or her more egalitarian personal standards.⁴³

Professors Macrae, Bodenhausen, and Milne conclude that a “heightened self-focus” increased the efficiency of the perceiver to regulate cognitive processing.⁴⁴ In lay terms, if the potential unconscious discriminator can be made aware of the tensions between his or her personal egalitarian standards and negative stereotypes, this will enhance the probability that his or her decisionmaking, e.g., promotion or discharge decisions, will not be unconsciously motivated.

C. Subtle Discrimination

Professor Mary P. Rowe, in her article entitled “*Barriers to Equality: The Power of Subtle Discrimination To Maintain Unequal Opportunity*,”⁴⁵ has described subtle discrimination as follows:

⁴¹ See *Wal-Mart Stores v. Dukes*, 131 S.Ct. 2541, 2555 (2011) (discussing statistical analyses used to bolster support for a gender discrimination class action lawsuit).

⁴² See C. Neil Macrae et al., *Saying No To Unwanted Thoughts: Self-Focus and the Regulation of Mental Life*, 74 J. PERS. SOC. PSYCHOL. 578 (1998); See also C. Neil Macrae et al., *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERS. SOC. PSYCHOL. 397 (1995).

⁴³ See generally Ann C. McGinley, “Viva La Evolucion!: Recognizing Unconscious Motive in Title VII,” 9 CORNELL J.L. & PUB. POL’Y 415. See also John F. Dovidio, et al., “On the Nature of Prejudice: Automatic and Controlled Processes: F. 33 EXPERIMENTAL SOC. PSYCHOL. 510, 534 (1997).

⁴⁴ See John F. Dovidio and Samuel L. Gaertner, *Prejudice, Discrimination and Racism: Historical Trends and Contemporary Approaches*, in PREJUDICE, DISCRIMINATION AND RACISM (Dovidio & Gaertner, eds. 1986). See also John F. Dovidio and Samuel L. Gaertner, *Changes In The Expression and Assessment of Racial Prejudice In Opening Doors*, PERSPECTIVE ON RACE RELATIONS IN CONTEMPORARY AMERICA, (Harry Knopke; Robert I. Norell and Ronald W. Rogers, eds. 1991).

⁴⁵ *Barriers to Equality*, *supra* note 24, at 153–63.

[S]ubtle discrimination is now the principal scaffolding for segregation in the United States. . . . This scaffolding is built of "micro-inequities" apparently small events, often ephemeral and hard-to-prove events, which are covert, often unintentional, frequently unrecognized by the perpetrator. Micro-inequities occur wherever people are perceived to be "different," Caucasians in a Japanese-owned company, African-Americans in a white firm, women in a traditionally male environment, Jews and Moslems in a traditional Protestant environment. These mechanisms of prejudice against persons of difference are usually small in nature, but not trivial in effect. They are especially powerful taken together. (As one drop of water has little effect, though continuous drops may be destructive, one racist slight may be insignificant, but many such slights cause serious damage.) Micro-inequities work both by, excluding the person of difference and by making that person less self-confident and less productive.⁴⁶

Professor Rowe further suggests "an employer may prevent such damage by developing programs on diversity, such as 'valuing differences' and team building."⁴⁷

In addition to the worthwhile suggestions of Professor Rowe, the establishment and implementation of internal conflict management systems, with optional access to an external corps of professional mediators, fact-finders, and other workplace dispute resolvers, would be an effective tool for the early resolution of these types of disputes. This point represents the overarching thesis of this article.

Many of the cases involving claims of discrimination, particularly those arising under Title VII, employ some variant of the evidentiary framework, initially set forth in *McDonnell-Douglas*,⁴⁸ for establishing claims of discrimination when there is no direct evidence of discrimination.⁴⁹ Under this framework, the plaintiff must initially establish a *prima facie* case.⁵⁰ The elements of this *prima facie* case will vary somewhat depending upon the type of discrimination alleged.⁵¹ If the plaintiff is successful in doing this, the burden shifts to the defendant to come forward with some legitimate, nondiscriminatory reason for its challenged action.⁵² Successfully proffering

⁴⁶ *Id.* at 153.

⁴⁷ *Id.*

⁴⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁴⁹ *Id.*

⁵⁰ *Id.* at 802.

⁵¹ *Id.*

⁵² *Id.*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

this reason will generally be sufficient to rebut the plaintiff's prima facie case.⁵³ The burden then shifts back to the plaintiff to show that the reason(s) advanced by the defendant for its action is pre-textual, i.e., is not the true reason for its action, and that the defendant intended to act in a discriminatory manner.⁵⁴ Issues of subtle discrimination typically arise when the plaintiff must demonstrate that the employer's proffered reasons for its actions are only a pretext for discrimination.⁵⁵

In determining whether or not to submit a matter to mediation or early settlement negotiations, the issue of whether a claim involves subtle discrimination versus overt or blatant disparate treatment is a critical factor. Professor Michael Selmi argues that, although the Supreme Court has explicitly recognized that discrimination has become more subtle and therefore more difficult to prove and has acknowledged the fact that subtle discrimination is no more permissible than overt or blatant discrimination, subtle discrimination is clearly actionable, at least in theory.⁵⁶ According to Selmi, the Supreme Court has affirmed this on many occasions.⁵⁷

In addition to the traditional forms of discrimination, the existence of "unconscious" or "subtle" discrimination is even more prevalent today and serves as the basis of many informal and formal claims of employment discrimination, as suggested by Rowe and other scholars.⁵⁸ These types of discrimination may be unintended, unconsciously perpetrated, and arguably not actionable under the applicable anti-discrimination laws. As asserted earlier, the economic and psychological impact and consequences of such unconscious and/or subtle acts of discrimination are just as pernicious and damaging to the victim of such acts as to the individual who is a victim of intentional and more easily provable discrimination. It is not suggested here that these "unconscious" or "subtle" forms of discrimination should be cognizable under the law. However, when people speak in terms of our "litigious society," but do not inquire as to why workers file claims, it is often unconscious and subtle discrimination that forms the basis for such litigation.⁵⁹

⁵³ *McDonnell Douglas Corp.*, 411 U.S. at 803.

⁵⁴ *Id.* at 804.

⁵⁵ *Id.*

⁵⁶ See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997).

⁵⁷ See generally *Id.*

⁵⁸ See ROWE, *supra* note 24, at 154.

⁵⁹ *Id.* at 159.

Human resources professionals, managers, and employment attorneys can better understand the nature and profound anger of racial minorities and female complainants if they are also made aware of the lifelong experience of being subject to unconscious and subtle discrimination. In many instances, the basis of a claim of discrimination is equally based on the complainant's broader and historical social experience of being the subject of unconscious and subtle discrimination, as well as the immediate controversy at hand.⁶⁰

Employing the early implementation and use of internal conflict management systems can effectively resolve these types of disputes, perhaps without the individual losing his or her job. This would be to the economic benefit of both the employer, the employee, and to society as a whole—particularly given the realities of the changing demographics of the workplace. Many more employment relations would be preserved with the early use of mediation, if it were made an option. Whether disparate treatment manifests itself in a subtle or overt form is ultimately irrelevant for purposes of liability.⁶¹

According to Professor Selmi, lower courts have also explicitly acknowledged the importance of recognizing subtle discrimination.⁶² In *Lynn v. Regents of University of California*,⁶³ a sex discrimination case, the court noted:

The beliefs that women should not have the right to vote, practice law, or serve on the United States Supreme Court, were once reflective of the majority view, and the law. We now understand, somewhat belatedly, that these concepts reflect a discriminatory attitude. Today any person is free to hold to such concepts, but such concepts may not serve as the basis for job-related decisions in employment covered by Title VII. Other concepts reflect a discriminatory attitude more subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting. . . . We are saying only what Title VII commands: when plaintiffs establish that decisions

⁶⁰ *Id.* at 158–59.

⁶¹ Selmi, *supra* note 56, at 312.

⁶² *Id.* at 338.

⁶³ *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981); *See also McDonnell Douglas Corp.*, 411 U.S. at 801–02 (1973) (observing that “[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, *subtle or otherwise.*”) (emphasis added).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

regarding academic employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such discriminatory attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.⁶⁴

Based upon the foregoing, it is reasonable to conclude that claims stemming from “subtle discrimination” are actionable—at least in theory.⁶⁵

III. SOME FACTUAL REALITIES OF ENFORCEMENT OF STATUTORY DISCRIMINATION LAWS

Given the importance of work as expressed by Sigmund Freud and William Shakespeare, among others,⁶⁶ it is not surprising that such workplace civil rights enforcement agencies as the EEOC⁶⁷ and the National Labor Relations Board (NLRB) come under considerable criticism on a regular basis.⁶⁸ Indeed, when the EEOC was first established, it was referred to as a “paper tiger.”⁶⁹

⁶⁴ *Lynn*, 656 F.2d at 1343 n.5.

⁶⁵ See generally Selmi, *supra* note 56.

⁶⁶ Rothstein et al., *supra* note 1, at 21.

⁶⁷ See E. Patrick McDermott et al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 20, 2000), <http://www.eeoc.gov/eeoc/mediation/report/chapter4.html> (reviewing the EEOC’s charge processing cycles over the last twenty years, starting in May 1977 with the reign of Chairwoman Eleanor Holmes Norton and ending in 2000 under the leadership of chairwoman Ida Castro and indicating that virtually every enforcement initiative has been hindered by a lack of funds, increasing responsibilities and overriding criticism that the charge-processing backlog has become unmanageable).

⁶⁸ See, e.g., JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994* (1995); WILLIAM B. GOULD IV, *LABORED RELATIONS: LAW, POLITICS AND THE NLRB—A MEMOIR* (2000).

⁶⁹ McDermott, *supra* note 67, (noting that the issue of funding also affects the EEOC’s mediation program). See *Race Discrimination: Report to U.N. Panel Lauds Recent Changes at EEOC for Improved Attacks on Race Bias*, 185 DAILY LAB. REP. (BNA) A-8 (Sept. 22, 2000) (applauding the efforts of the EEOC in reducing its backlog, hiring new employees and improving technology while also pointing to the fact that “[i]nadequate enforcement of existing anti-discrimination laws due to underfunding of federal and state civil rights agencies is among a host of reasons cited for the ‘subtle forms of discrimination against minority individuals and groups’ that exist in American society.”); Fawn Johnson, *Congress: In Parting, Goodling Urges Regulatory Caution, Amending Outdated Labor Laws*, 248 DAILY LAB. REP. (BNA) C-1 (Dec. 27, 2000)

While the staffs of such enforcement agencies are generally committed to carrying out the mission of these agencies, the ever-changing political philosophies of Presidential administrations and budget constraints often hinder agencies in fulfilling their missions.⁷⁰ Several other realities related to the enforcement and litigation of Title VII claims come into play. The first is that many of the charging parties have a very difficult time retaining legal representation.⁷¹ This is the case even in the face of the provisions for awarding attorney fees under the Civil Rights Act of 1991.⁷² The difficulty in

(mentioning Republican attempts to prevent the Occupational Safety and Health Administration); Julie Harders, *Too Good to Last? Budget Cuts Force the EEOC to Terminate Contract Mediators From its New, Highly Touted Program*, A.B.A. J., at 30 (Apr. 2000). See also Fawn Johnson, *EEOC: Castro Says FY 2000 Budget Means Loss of Mediation Program's External Contractors*, 38 DAILY LAB. REP. (BNA) A-10 (Feb. 25, 2000) [hereinafter Johnson, *EEOC: Castro*] (discussing that \$800 per mediation by private mediators would not be funded in 2000 as the EEOC reached out to organizations to provide pro bono mediation services); Fawn Johnson, *EEOC: House Subcommittee Approves Increase of \$10 Million in EEOC's FY 2001 Budget*, 111 DAILY LAB. REP. (BNA) A-10 (Jun. 8, 2000) [hereinafter Johnson, *EEOC's FY 2001 Budget*]. See generally Michael Z. Green, *Proposing A New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation*, 105 DICK. L. REV. 305, 312 n.14, 323 n.51-52, 325, n.59 (2001) (summarizing the history and political compromises behind the passage of Title VII and reporting on the many individuals referring to the EEOC as a "paper tiger," or "toothless tiger") [hereinafter *Enforcement After 35 Years*]; Alfred Blumrosen, *Black Employment and the Law* (1971); *The 1970's: The "Toothless Tiger" Gets Its Teeth - A New Era of Enforcement*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/history/35th/1970s/index.html> (last visited Sept. 2, 2011).

⁷⁰ McDermott, *supra* note 67; Harders, *supra* note 69, at 30; Johnson, *EEOC: Castro*, *supra* note 69, at A-10; Johnson, *EEOC's FY 2001 Budget*, *supra* note 71, at A-10; *Race Discrimination: Report to U.N. Panel Lands Lauds Recent Changes at EEOC for Improved Attacks on Race Bias*, *supra* note 69. See generally Michael Z. Green, *Proposing A New Paradigm For EEOC Enforcement After 35 Years: Outsourcing Charge Processing By Mandatory Mediation*, 10 DICKINSON L. REV. 305 (2000-2001).

⁷¹ See, e.g., Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity For Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 3 (1994); See also Lamont E. Stallworth, *Behind the Eight Ball: The Unrepresented Claimant and Employment Dispute Resolution*, ACRESOLUTION, Spring 2002, at 26-29 [hereinafter *Behind the Eight Ball*] (suggesting that trained non-attorneys can provide either representation or technical assistance, at least in the mediation process and the issue of attorney representation and the imbalance of power have also been addressed by a number of other scholars).

⁷² See BERNARD D. REAMS, JR. AND FAYE COUTURE (EDITORS) LEGISLATIVE HISTORY OF THE 1991 ACT PUBLIC LAW 102-166 WHICH AMENDED THE CIVIL RIGHTS OF

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

obtaining legal representation deters individuals from seeking redress under Title VII, and many members of economically disadvantaged groups are directly affected by this reality.⁷³

Second, the EEOC has been chronically underfunded and understaffed.⁷⁴ This results in investigations often taking an inordinate amount of time to complete and provides an example of the phrase, “Justice delayed is justice denied.” The delay psychologically and economically affects the charging party or plaintiff and his or her family, which in turn affects the thoroughness and quality of EEOC investigations.⁷⁵ Consequently, as Professor Michael Green argues, the EEOC has become more of a case handling or processing agency as opposed to an actual enforcement agency.⁷⁶

1964 (Seven Volumes including 1B3 Documents) (For the legislative history of the Civil Rights Act of 1991 and explaining that The Civil Rights Act of 1991 attempted to address the issue of attorney representation by providing for payment of attorney fees where a plaintiff prevails under the Act in cases involving disparate treatment).

⁷³ See, e.g., Sandra Gleason, *The Probability of Redress: Seeking External Support*, in BARBARA L. FORISHA & BARBARA H. GOLDMAN, *OUTSIDERS ON THE INSIDE: WOMEN & ORGANIZATIONS* 171 (1981). See Generally D.M. SAUNDERS, B.H. SHEPPARD & V. KNIGHT, *WHEN DO EMPLOYEES SPEAK UP?: FACTORS INFLUENCING THE PROPENSITY TO USE VOICE* (Nat’l Inst. of Disp. Resol. ed., 1987); Gail Schmoller Philbin, *Silent Majority: Before Laws Made It Illegal, Sexual Harassment Was Often Swept Under the Rug*, Chi. Trib., Feb. 24, 2004, at C1; Sana Siwolop *Management: Recourse or Retribution?; Employers Are Taking On Disgruntled Workers in Court*, N.Y. TIMES, June 7, 2000, at C1 (asserting that increasingly defendant employers have treated charging parties and plaintiffs harshly in the process of mounting their defense); PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999).

⁷⁴ See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *SERVING THE NATION FOR 45 YEARS: FY 2012 CONGRESSIONAL BUDGET JUSTIFICATION 1* (2011) (“An increasing number of job seekers and workers across the country have turned to the EEOC for assistance with discrimination complaints in the first decade of the 21st century, yet funding and staffing declined significantly during much of that period. Between 2000 and 2008, the EEOC’s staffing level dropped by nearly 30%. At the same time, as its jurisdiction expanded, the number of discrimination charges filed with the EEOC reached historic levels, peaking between 2008 and 2010. The convergence of these factors yielded a growing backlog of unresolved discrimination charges.”).

⁷⁵ See, e.g., Peter T. Kilborn, *A Family Spirals Downward in Waiting for Agency to Act*, N.Y. TIMES, Feb. 11, 1995, at A1.

⁷⁶ See, e.g., Green, *supra* note 69, at 305–56 (criticizing the EEOC as being more of a case processing entity as opposed to an enforcement agency); See also Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39, 40–41(1994) (noting that “[o]ne pitfall of the compromise frenzy [leading up to Title VII’s passage] was that the remedial section of the statute,

The third reality is that, notwithstanding the public policy encouraging the use of ADR, only a limited number of employers have actually adopted and implemented legitimate or credible internal conflict management systems.⁷⁷ Employers who have implemented integrated conflict management systems (ICMS) have likely done so primarily as a result of the filing of an EEOC charge or lawsuit that resulted in considerable damages and bad publicity.

In the absence of early access to effective internal conflict management systems, a complaining worker essentially has three alternatives: (1) remain silent and accept the situation giving rise to the conflict; (2) remain in the organization, but “exercise voice” by engaging in, for example, such counter

originally written to provide for judicial relief incidental to central agency enforcement, was adopted without further conference or significant debate.”); James E. Jones, Jr., *Some Reflections on Title VII of the Civil Rights Act of 1964 at Twenty*, 36 Mercer L. Rev. 813, 820-21 (1984) (describing Senate action to remove prosecutorial authority from Title VII bill); Nancy Montwieler, *Commission’s Case Inventory Keeps Dropping, But Monetary Benefits Were Lower Last Year*, 6 DAILY LAB. REP. (BNA) C-1 (Jan. 9, 2001); Ronald Turner, *Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 472-74 (1995) (asserting that Title VII has had a positive impact on the economic conditions of African-Americans, as a whole and contributing to more in the middle class); *Major Impact of Title VII is Cited as Seminar Marks 30-Year Anniversary*, 122 DAILY LAB. REP. (BNA) D-24 (June 28, 1994); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL’Y REV. 219, 219 (1995) (stating that “race discrimination in employment remains pervasive despite three decades of government effort” and asserting that the EEOC has been “constrained to focus on processing individual charges of discrimination” rather than being able to “concentrate on combating broader unlawful practices”); *EEOC: New Charge-Processing System Means More Action at Local Level, Official Says*, 92 DAILY LAB. REP. (BNA) D-9 (May 12, 1995); Nancy Montwieler, *EEOC Reduces Pending Inventory By Half—to 58,000 Cases—in Three Years*, 157 DAILY LAB. REP. (BNA) A-1 (Aug. 14, 1998); *EEOC Statistics on Charge Receipts and Resolutions*, 157 DAILY LAB. REP. (BNA) E-6 (Aug. 14, 1998); Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 542-44 (1987) (discussing the “rapid charge processing” program of Chairwoman Norton, the critical GAO report and the response of Chairman Thomas).

⁷⁷ DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN COMPANIES FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 11 (2003) [hereafter *Lipsky & Seeber, et.al.*].

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

workplace behavior as sabotage, absenteeism, and workplace violence;⁷⁸ or (3) exercise voice by filing an external EEOC charge or lawsuit.⁷⁹

Common sense holds that, once an employee files a claim or lawsuit, he or she often is no longer wanted by the employing organization. This dynamic is manifest through EEOC and private mediation programs. It is the general practice that as a condition for most “successfully” mediated resolutions of EEO disputes, the charging party must agree to sever employment, agree to never apply for future employment with that employer, and waive and release any potential future related claims related to his or her employment.

It is very doubtful that the drafters of Title VII intended the Act to operate in this fashion. Among other things, this reality has a “chilling effect on potential victims of discrimination.”⁸⁰ It also goes against the principle recognizing “diversity being in the public interest,” as pronounced by the *Grutter* Court.⁸¹ In addition, these types of “buyout” settlements often do not

⁷⁸ See Charlotte Rayner & Loreleigh Keashly, *Bullying at Work: A Perspective from Britain and North America*, in COUNTERPRODUCTIVE WORK BEHAVIOR: INVESTIGATIONS OF ACTORS AND TARGETS 271 (Suzy Fox & P.E. Spector eds., 2004).

⁷⁹ Paul Steven Miller, *A Just Alternative or Just an Alternative? Mediation and the Americans With Disabilities Act*, 62 OHIO ST. L. J. 11, 21 (2000) (reporting that an independent study of the EEOC’s found that 91% of the charging parties and 96% of the responding parties would use mediation again and that only 31% of employers opted into the EEOC’s mediation program when offered, as compared to an 83% acceptance rate for charging parties in fiscal year 2000).

⁸⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (holding that where an employer has an employment practice or policy which appears to be “neutral” on its face but when applied has disproportionate effect or disparate impact on protected class that such a “neutral” practice or policy may constitute a violation of Title VII). Consequently, where an employer has a general or neutral policy of refusing to pay attorney fees, for example, unless there is a waiver and release as part of an EEOC settlement that this policy or practice would most likely have a negative impact on racial minorities and women, thus constituting a violation of Title VII. Similarly, where a charging party remained employed but subsequently his or her performance evaluation was effectively conducted by the law department would also constitute disparate treatment in violation of Title VII.

⁸¹ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that the use of race in law school admissions was permitted and indicating that “diversity” is a matter of public interest). Consequently, the author argues throughout this Article that the “file a charge or lawsuit and lose your job” runs counter to this public interest and thus early access to internal conflict management programs and ADR would appear to promote this “public” interest of “diversity.” Furthermore, at minimum federal contractors should be required to have such internal programs.

address the organizational or cultural basis for the dispute. Employers would be more inclined to resolve most statutory-based disputes, including EEO disputes, if there were attempts to resolve the matter early on internally and privately versus filing a public claim externally at a later stage, which leads to much higher costs.

It is partially the reality of this “file a charge/lose your job” dynamic that prompts the advancement of NEDRA. This legislation would provide for the early problem solving and resolution of such claims and would also serve as an integral component in fulfilling the “unfinished work of the Civil Rights Act of 1964.”⁸²

A final reality of the enforcement and litigation of claims under Title VII is that even where plaintiffs prevail, the statistics suggest that there is a greater probability that on appeal these verdicts favorable to plaintiffs have a greater probability of being reversed than those of defendants. In a study conducted by Cornell Law School Professors Theodore Eisenberg and Stewart J. Schwab, researchers found that employment discrimination plaintiffs did dramatically worse than defendants on appeal.⁸³ Moreover, this differential is greater in employment discrimination cases than in any other category of civil cases.⁸⁴

⁸² Symposium, *The Unfinished Work of the Civil Rights Act of 1964: Shaping an Agenda for the Next 40 Years*, Howard University School of Law (2004).

⁸³ Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. OF EMPIRICAL LEGAL STUD. 429, 446-456 (2004).

⁸⁴ See *id.* at 451-52; Susan Mandel, *Equal Treatment? Study Shows a Wide Gap Between Worker, Employer Wins in Job Bias Appeals*, A.B.A. J. 24, 24 (Nov. 2001). But see Harry T. Edwards & Linda Elliott, *Beware of Numbers (and Unsupported Claims of Judicial Bias)*, 80 WASH. U.L.Q. 723, 734 (2002) (claiming that Clermont and Eisenberg made the mistake “of trying to extrapolate too much from limited data”); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002). See generally Kevin M. Clermont et al., *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547 (2003). *Contra*, Kevin M. Clermont & Theodore Eisenberg, *Judge Harry Edwards: A Case in Point!*, 80 WASH. U.L.Q. 1275 (2002) [hereinafter *Harry Edwards*] (criticizing the Edwards and Elliott article and its assertions); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 560-61 (2001) (asserting that employers prevail in 98% of federal court employment discrimination cases resolved and how these cases tend to be resolved at the pre-trial stage).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

Although the findings of Professors Eisenberg and Schwab have been questioned by a number of observers,⁸⁵ they should not be ignored, particularly given the deference which appeal courts should afford trial courts' findings of fact. Specifically, in *Albemarle Paper Company v. Moody*,⁸⁶ the Supreme Court stated in relevant part "the courts of appeals must maintain a consistent and principled application of the . . . statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases."⁸⁷

Setting aside differences on this issue, the Eisenberg-Schwab Report undoubtedly provides a prism through which anyone who supports social and workplace justice and workplace diversity should view the realities of litigating Title VII claims. This scenario is further complicated when one considers that the majority of Title VII claimants are unable to obtain legal representation.⁸⁸

⁸⁵ See, e.g., Harry T. Edwards and Linda Elliott, *Beware of Numbers and Unsupported Claims of Judicial Bias*, 80 WASH. U.L.Q. 723, 734 (2002) (claiming and Clermont and Eisenberg made the mistake "of trying to extrapolate too much from limited data").

⁸⁶ *Albemarle Paper Company v. Moody*, 422 U.S. 405 (1975).

⁸⁷ *Id.* at 421–22.

⁸⁸ Maltby, *supra* note 71, at 3; see also Lamont E. Stallworth, *Finding A Place For Non-Lawyer Representation in Mediation*, DISP. RESOL. MAG. 19 (Winter 1997);. See Stallworth, *supra* note 71 at 27–29. The issue of worker representation in mediation has been the concern of a number of professional organizations. See *SPIDR Panel Tackles Issue of Unrepresented Claimant*, INDIVIDUAL EMPL. RTS. (BNA) at 3 (Sept. 20, 1995). In addition, at least one member of Congress has recognized the problem of worker representation and proposed legislation to address it. See *Employment Dispute Resolution Act of 1994*, S. 2327, 103d Cong. (1994); *Danforth Introduces Mediation Bill*, DAILY LAB. REP. (BNA), July 29, 1994, at A-20; Arup Varma & Lamont E. Stallworth, *Participants' Satisfaction With EEO Mediation and the Issue of Legal Representation: An Empirical Study Inquiry*, 6 EMP. RTS. & EMP. POL'Y J. 387, 387–418 (2002) (examining empirically the issue of legal representation); see Michael Z. Green, *Finding Lawyers For Employees in Discrimination Disputes As A Critical Prescription For Unions To Embrace Racial Justice*, 7 U. Pa. J. Lab. & Emp. L. 55, 55–118 (2004) [hereinafter *Finding Lawyers*]. See generally, MICHELE HERMANN, ET AL., THE METROCOURT PROJECT FINAL REPORT (1993); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (expressing the idea that mediation poses a substantial danger to unwilling female participants); Michele Hermann, *New Mexico Research Examines Impact of Gender and Ethnicity In Mediation*, DISP. RESOL. MAG. 10 (Fall 1994); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated*

Given these realities alone, workers who have early access to legitimate internal conflict management systems would have a much more cost-effective and humane way of providing workplace justice, which is one of the overarching goals and objectives of NEDRA.

IV. AT A CROSSROADS: THE LEGAL AND PUBLIC POLICY CONTEXT OF ADR IN THE WORKPLACE

Just as this country continuously struggles with the broader societal issue of race relations, the field of ADR is also at a crossroads. This is not the first time there has been a need to reflect upon how workplace disputes might be more effectively resolved as a matter of public policy. Historically, law and public policy have been used as the bases and vehicles to encourage the private resolution of these disputes.⁸⁹ In this context, several ADR issues/questions arise:

1. How to design and implement “legitimate” ICMS that (a) provide both procedural and substantive due process;⁹⁰ (b) are timely and financially affordable for all disputants; and (c) address the potential “imbalance of power” which might exist between the employer and individual worker⁹¹
2. How to identify, develop and ensure the utilization of a demographically diverse corps of workplace neutrals

Civil Cases, 30 LAW & SOC’Y REV. 767 (1996); Arup Varma & Lamont E. Stallworth, *Participants’ Satisfaction With EEO Mediation and the Issue of Legal Representation: An Empirical Study Inquiry*, 6 EMP. RTS. & EMP. POL’Y J. 387, 387–418 (2002) (examining empirically the issue of legal representation); Michael Z. Green, *Finding Lawyers For Employees in Discrimination Disputes As A Critical Prescription For Unions To Embrace Racial Justice*, 7 U. PA. J. LAB. & EMP. L. 55, 55–118 (2004) [hereinafter *Finding Lawyers*].

⁸⁹ See, e.g., PAUL R. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 94 (1966) (repudiating the precepts established in the *Steelworkers’ Trilogy*); but see Saul Wallen, *Arbitrators and Judges: Dispelling the Hays Haze*, CAL. MGMT. REV. 17, 17–24 (Spring 1967).

⁹⁰ These processes must also be perceived as being fair, efficacious, and providing a relatively “user friendly” form of workplace justice.

⁹¹ This potential “imbalance of power” might stem from one of the disputants being more knowledgeable and sophisticated about relevant law and advocacy. Imbalance of power might also stem from one disputant possessing substantially more financial resources than the other disputant. Also related to the issue of imbalance of power is issue of competent and/or legal representation.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

3. How to develop organizations that are both “diversity competent” and “conflict-management competent,” and are able to recognize and sanction inappropriate and discriminatory behavior based on unconscious and subtle discrimination
4. How to make ICMS available early in a controversy or dispute
5. Under what conditions should the EEOC, state EEO enforcement agencies, and the courts defer to the outcomes flowing from both interest based and rights based ADR processes?
6. Under what general conditions should the courts of appeals defer to the findings of fact of the trial court, as suggested in the article by Eisenberg and Schwab?⁹²
7. Whether participation in ADR processes should be mandatory (with voluntary settlement outcomes) or strictly voluntary

Three other critical issues that must be addressed are (1) the costs related to these ADR processes and the question of which disputant should generally be responsible for bearing such costs; (2) the issue of competent legal representation and whether trained non-attorneys should be permitted to represent workers in such processes (e.g. a trained paralegal working under the supervision of a licensed attorney); and (3) the assurance that racial minority workplace neutrals shall actually be allowed and regularly used in these ADR processes. The failure to do so would effectively create a “private justice system” designed to effectuate our EEO laws, but which is ironically de facto exclusionary and discriminatory.

A. *Self-Regulation of the U.S. Workplace*

The U.S. industrial relations system was founded, in part, on the premise that there would be limited government involvement in labor and management matters.⁹³ It was further envisioned that labor and management would be able to self-regulate their interplay via the collective bargaining process.⁹⁴ This was one of the thoughts behind the enactment of the Wagner

⁹² See *supra* note 83–84 and accompanying text.

⁹³ See Lamont E. Stallworth, *Government Regulation of Workplace Disputes and Alternative Dispute Resolution*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP (Bruce E. Kaufman ed., 1997); See generally JOHN T. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 370 (1958).

⁹⁴ *Id.*

Act and Taft-Hartley Act.⁹⁵ Based upon this public policy premise, the Supreme Court has consistently embraced the use of mediation and labor arbitration as the preferred means of resolving industrial disputes.⁹⁶ This principle was clearly set forth in a series of landmark decisions called the *Steelworkers' Trilogy*.⁹⁷ Although there were a number of observers who questioned the basis of the Supreme Court's endorsement of labor arbitration at this time,⁹⁸ it is fair to state that from the 1960's up until 1974, the primacy of labor arbitration was recognized as a private, voluntary, and final and binding dispute resolution process.⁹⁹ There were, however, a limited number of exceptions, such as a breach of the duty of fair representation ("DFR").¹⁰⁰ Interestingly, a number of the DFR disputes involved the race-based discriminatory handling of grievances.¹⁰¹

⁹⁵ The National Labor Relations Act § 203D, 29 U.S.C.A. § 203(d), 29 U.S.C.A. § 151–169 (West 2011); 29 U.S.C.A. § 173(d) (West 2011):

Use of conciliation and mediation services as last resort. Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

⁹⁶ See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567–68 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598–99 (1960).

⁹⁷ See *United Steelworkers of Am. V. Am. Mfg. Co.*, 363 U.S. at 567–68; *United Steelworkers of Am. V. Warrior & Gulf Navigation Co.*, 363 U.S. at 585; *United Steelworkers of Am. V. Enterprise Wheel & Car Corp.*, 363 U.S. at 598–99; See also *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 458–59 (1957); *Boys Mkt, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 253–55 (1970); *Collyer Insulated Wire*, 192 N.L.R.B. 837, 846 (1971).

⁹⁸ See Wallen, *supra* note 89.

⁹⁹ See *infra* note 116.

¹⁰⁰ See *Glover v. St. Louis–San Francisco R. Co.*, 393 U.S. 324, 328–331 (1969) (holding that where a worker can show that it would be futile to seek remedy via an internal grievance procedure that the “exhaustion principle” does not apply; therefore the worker may file a Section 301 breach of the duty of fair representation lawsuit in federal court). The *Glover* principle that resort to arbitration will not be required in duty of fair representation cases alleging racial discrimination, is also applied to Title VII where the courts have held that exhaustion of contractual remedies is not required. See, e.g., *Evans v. Local 2127 IBEW*, 313 F. Supp. 1354, 1358 (N.D. Ga. 1969). The same holds true of suits under 42 U.S.C. § 1981. See, e.g., *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974). *Glover* was seen by a number of observers as a harbinger of

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

In *Alexander v. Gardner-Denver*, the Supreme Court's concern about the possible failure of unions to adequately and fairly represent racial minority workers in the grievance and arbitration process was a major concern of the Court, albeit one primarily stated in a footnote.¹⁰² *Gardner-Denver* therefore primarily addressed the DFR issue and the potential resulting "lack of harmony of interest" in cases involving the private resolution of statutory based claims of discrimination.¹⁰³

The principle of limited government intervention and self-regulation of labor-management relations was premised on laws governing the economic interplay of two institutional entities, namely labor organizations and employers. These collective rights and interests—not the interests and statutory rights of individual workers—were the overarching purpose of the Wagner Act and Taft-Hartley Act. In the words of Professor David Feller, the Wagner Act and Taft-Hartley Act are illustrative of "traditional labor law."¹⁰⁴ It was these institutional types of disputes that labor and management voluntarily agreed to submit to final and binding resolution by a private process called labor arbitration. This is the legal and public policy context within which industrial disputes (now termed "workplace disputes") were resolved prior to the enactment of Title VII.

B. Integration of Title VII and The ADEA in the Workplace

The enactment of Title VII created a new variable in the labor-management and private workplace dispute resolution equation, as distinguished from traditional labor law—which focused on institutional or collective interests and rights. The primary and expressed focus of Title VII is on individual statutory rights. These individual statutory rights are separate and not dependent upon the existence of a labor organization and collective bargaining agreement. Title VII, according to Professor David Feller, is

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Author notes the *Gardner-Denver* Court was quick to note its concern over the possible "lack of harmony of interest" and problem of duty of fair representation in cases involving alleged racial discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). See, e.g., WILLIAM B. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 210 (1977).

¹⁰¹ *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987).

¹⁰² See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974).

¹⁰³ *Id.*

¹⁰⁴ See David E. Feller, *The Impact of External Law Upon Labor Arbitration*, in *THE FUTURE OF LABOR ARBITRATION IN AMERICA* 84 (Joy Correge et al., 5th ed., 1976).

illustrative of what he called “employee-employer relations law,” or laws that regulate the interplay between the individual worker and his or her employer.¹⁰⁵

1. *Alexander v. Gardner-Denver Co.*

In *Gardner-Denver*, workplace disputes involving employee-employer relations law arose within the institutional context of a collective bargaining agreement containing both a grievance and arbitration procedure, and a non-discrimination provision.¹⁰⁶ The case involved the discharge of an African-American employee for allegedly producing an excess amount of metal scrap.¹⁰⁷ According to the employer, this was the basis for Harrell Alexander’s discharge.¹⁰⁸ According to Harrell Alexander, his discharge was unlawfully and racially motivated.¹⁰⁹ In addition to the grievance, Alexander also filed a formal external claim of racial discrimination pursuant to Title VII.¹¹⁰

The arbitrator found that Alexander’s grievance lacked merit and that his discharge was for just cause.¹¹¹ In light of the arbitrator’s decision and the Supreme Court’s decision in the *Steelworkers Trilogy*,¹¹² the employer asserted that the arbitrator’s award was final and binding on the parties.¹¹³ The employer further asserted that the arbitration decision had a “preclusive effect” and that Alexander’s subsequent or concurrent redress under any otherwise applicable federal or state EEO laws was foreclosed.¹¹⁴

In this landmark decision, the Supreme Court held that the arbitral award did not have a “preclusive effect” and that Harrell Alexander may

¹⁰⁵ *Id.*

¹⁰⁶ *Gardner-Denver Co.*, 415 U.S. at 40.

¹⁰⁷ *Id.* at 38.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 42.

¹¹⁰ *Id.* at 45.

¹¹¹ *Gardner-Denver Co.*, 415 U.S. at 42.

¹¹² See *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

¹¹³ *Gardner-Denver Co.*, 415 U.S. at 54.

¹¹⁴ *Id.* at 55.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

concurrently and/or subsequently file a timely claim of unlawful discrimination.¹¹⁵ Specifically, the *Gardner-Denver* Court concluded:

We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight, as the court deems appropriate.¹¹⁶

The *Gardner-Denver* decision at first glance appears to be anti-arbitration and private dispute resolution. However, the Court was very clear that labor arbitration might still have an important function in the private resolution of "individual factual" claims of discrimination. The *Gardner-Denver* decision made a clear distinction between private resolutions of individual statutory-based discrimination claims and contract based discrimination grievances.¹¹⁷ Thus, the Court held that an employee may exercise his or her right to use the contractual grievance arbitration procedure and/or the EEO administrative agency procedure to resolve his or her claim of discrimination.¹¹⁸

There are, however, two points to be made in regards to the Court's assertion of the relative "inferiority" of traditional labor arbitration as compared to the judicial process. First, notwithstanding the *Gardner-Denver* decision, discrimination grievances continue to be resolved through labor arbitration on a regular basis.¹¹⁹ Second, as the Court stated, arbitration can still play an important function in the resolution of individual factual claims of discrimination. The *Gardner-Denver* Court seems to suggest in dicta, and in footnote 21, that if traditional arbitration procedures were to incorporate certain procedural and substantive due process elements, thus altering

¹¹⁵ *Id.* at 59.

¹¹⁶ *Id.* at 59–60.

¹¹⁷ *Id.* at 48.

¹¹⁸ *Airline Pilots Ass'n v. Nw. Airlines, Inc.*, 199 F.3d 477, 486 (1999) [hereinafter called *ALPA*]; *cf. Capitol/Ford, Inc.*, 2002 WL 265821 (N.L.R.B.G.C.) (2002).

¹¹⁹ See, e.g., Michele M. Hoyman & Lamont E. Stallworth, *Arbitrating Discrimination Grievances in the Wake of Gardner-Denver*, MONTHLY LAB. REV. 3 (Oct. 1983) [hereinafter *Hoyman and Stallworth Study*].

traditional labor arbitration procedures, the arbitral decisions may be given "considerable evidentiary weight" if petitioned for vacatur.¹²⁰

The Court was sending a rather clear signal to labor and management to redesign their traditional contractual grievance arbitration procedures so as to more effectively address the concerns of the Court. These concerns included the possible breach of a union's duty of fair representation and the possible lack of harmony of interests.¹²¹ Among other things, this re-designing might also include permitting the grievant a greater degree of direct participation in the labor arbitration process, perhaps even having separate attorney representation and participation in the actual selection of the labor arbitrator.¹²² There have been few court decisions in the labor and

¹²⁰ Specifically, the Court stated:

Moreover, the grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

Gardner-Denver Co., *supra* note 104, at 55. See also William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 47-48 (1969); Harry H. Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398, 1353-54 (1969).

¹²¹ See, e.g., Lamont E. Stallworth & Martin Malin, *Conflicts Arising Out of Work Force Diversity*, in PROCEEDINGS OF THE 46TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 120 (1993).

¹²² The argument for third party intervention and greater direct participation by the grievant in the arbitration has been considered as far back as the 1950's. See WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS 229-34; Bernard Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731-60 (1950); Gregory J. Kamer, *Employee Participation in Settlement Negotiations and Proceedings Before OSHRC*, 31 LAB. L.J. 208-22 (1980). One of the primary arguments against the third-party intervention approach may be that it runs against the concept of exclusivity established under the National Labor Relations Act. See, e.g., George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897, 909 (1975); It has also been argued that having one's counsel or representative in a third-party intervention

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

employment field that have spawned more discussion and debate than *Gardner-Denver*.¹²³ A number of subsequent courts have also stated that traditional labor arbitration is a relatively inferior process for resolving

procedure could effectively operate against the grievant. Specifically because the union may choose not to cooperate in the preparation of the case. Moreover, if there is an apparent “tension” between the union and employer, the arbitrator may resolve doubts against the employee. See James Atleson, *Disciplinary Discharge, Arbitration, and NLRB Defenses Deference*, 20 BUFF. L. REV. 355, 357 (1971); see also Bernard Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 45 (1971). Another concern is that undesignated civil rights groups might attempt to intervene in such disputes without being designated by the grievant. It is interesting to note that in more contemporary times and with the benefit of the experiences following *Gardner-Denver*, *Gilmer*, and *Circuit City* that the concept of affording employees greater involvement in both the design and direct participation in dispute resolution programs and policies has become recognized by more experts in the field of dispute resolution. See Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 907 (2002) (suggesting the importance of having employees involved in the dispute resolution system design); see also Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 221 (2004) (calling for more scrutiny of dispute systems that are designed by only one of the parties to see the effects).

¹²³ The issue of the application of external law and the role of the arbitrator has prompted considerable research and debate. In such circumstances the Parties would have so stipulated and/or the contract would expressly indicate that external laws such as Title VII and related case law were to be followed. However, there is debate over this issue. See, e.g., Thomas Adair, *When Should Arbitrators Follow the Federal Law: Comment*, in ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS: PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS OF THE 23RD ANNUAL MEETING 47–54 (Gerald Somers & Barbara Dennis eds. 1970); David E. Feller, *The Impact of External Law Upon Labor Arbitration*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 83 (Joy Corrige, Virginia A. Hughes & Morris Stone eds. 1976); Bernard Meltzer, *Ruminations about Ideology, Law and Labor Arbitration*, in THE ARBITRATOR, THE NLRB, AND THE COURTS: PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS, 20TH ANNUAL MEETING 1 30 (Dallas Jones ed. 1967); Richard Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE 21ST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 42, 44 (Charles Rehmus ed. 1968); Michael Sovern, *When Should Arbitrators Follow Federal Law*, ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS, PROCEEDINGS OF THE 23RD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 29, 30 (Gerald Somers & Barbara Dennis eds. 1970); Theodore J. St. Antoine, *The Role of Law in Arbitration: Discussion*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION, PROCEEDINGS OF THE 21ST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 75, 77–79 (Charles Rehmus ed. 1968).

statutory-based disputes.¹²⁴ Accordingly, the courts have expanded the *Gardner-Denver* rationale to other types of statutory-related grievances.¹²⁵

The *Gardner-Denver* decision prompted a general focus and debate on what role private arbitration procedures might play in the final and binding resolution of individual statutory based claims of discrimination arising in the non-union setting. The first issue in the aftermath of *Gardner-Denver* was whether an employer may require employees to enter into final and binding private arbitration agreements as a condition of employment. The second issue concerned whether such mandatory agreements to arbitrate were enforceable in court, thereby having a “preclusive effect” on a worker pursuing the same claim through the public justice system (i.e. EEOC and the federal and state courts).¹²⁶ In a number of ways, this latter issue is a variation of *Gardner-Denver*, but arises in the non-union setting and involves the contractual relationship between an individual worker and his or her employer.

2. *Gilmer v. Interstate/Johnson Lane Corp.*

The Supreme Court addressed these issues in *Gilmer v. Interstate/Johnson Lane*.¹²⁷ *Gilmer* involved an employee in the securities industry who entered into what is called a “U-4” agreement as a condition of his employment.¹²⁸ *Gilmer* was required by his employer to register as a securities representative with, among others, the New York Stock Exchange (NYSE).¹²⁹ His registration application contained, inter alia, an agreement to arbitrate when required by NYSE rules.¹³⁰ NYSE Rule 347 provided for the arbitration of any controversy arising out of a registered representative’s employment or termination of employment.¹³¹

¹²⁴ See *Gardner-Denver Co.*, 415 U.S. at 57 (discussing the relative inferiority of the fact-finding process in labor arbitration compared to the judicial system).

¹²⁵ See *ALPA*, 199 F.3d at 486–87.

¹²⁶ *Id.* at 481–82.

¹²⁷ See *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 23 (1991).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 24 (affirming the decision of the Court of Appeals 895 F.2d 195 (4th Cir. 1990), holding that an individual worker could be subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application).

¹³¹ *Id.* at 23.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

Gilmer was terminated at age sixty-two.¹³² Thereafter, he filed a charge with the EEOC and brought suit in the district court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA).¹³³ The employer moved to compel arbitration, relying on the agreement in Gilmer's registration application and the Federal Arbitration Act (FAA).¹³⁴ The district court denied the motion based on the holding in *Gardner-Denver* and also because it concluded that Congress intended to protect ADEA claimants from a waiver of the judicial forum.¹³⁵ The Court of Appeals reversed.¹³⁶

The Supreme Court held that the mandatory arbitration provision was enforceable, thus foreclosing any recourse for Gilmer through the EEOC or the courts.¹³⁷ In upholding the enforceability of mandatory arbitration procedures, *Gilmer* is distinguished from *Gardner-Denver*:

In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement was precluded from subsequently bring a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective bargaining agreement are distinct from the employee's statutory Title VII rights:

There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and

¹³² *Gilmer*, 500 U.S. at 23.

¹³³ *Id.* at 24.

¹³⁴ *Id.* at 22.

¹³⁵ *Gilmer v. Interstate/Johnson Lane*, 895 F.2d 195, 196 (1990).

¹³⁶ *Id.*

¹³⁷ *Gilmer*, 500 U.S. at 26. Specifically, the *Gilmer* Court held that:

Statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Since the FAA manifests a liberal federal policy favoring arbitration, and since neither the text nor the legislative history of the ADEA explicitly precludes arbitration, *Gilmer* is bound by his agreement to arbitrate unless he can show an inherent conflict between arbitration and the ADEA's underlying purposes.

the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective bargaining agreement the claimants were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." [citation omitted]. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.¹³⁸

The *Gilmer* decision was embraced by some employers but was generally denounced by the plaintiff's bar, civil rights organizations, and the EEOC.¹³⁹ There are a number of ways of viewing the implications of *Gilmer*. Some would agree that the decision relieves a worker of his or her civil rights.¹⁴⁰ Others would just as strongly argue that *Gilmer* benefits workers and merely requires them to seek recourse of their individual statutory claim in another forum, i.e. private employment arbitration.

3. *Circuit City Stores, Inc. v. Adams*

The question of whether the *Gilmer* rationale would extend to similar situations involving mandatory arbitration agreements between an individual worker and an individual employer was addressed in *Circuit City Stores, Inc. v. Adams*.¹⁴¹ In the employment application of the employer, Circuit City, a provision existed which required all employment disputes to be resolved by final and binding arbitration.¹⁴² After Adams was hired, he filed a state law

¹³⁸ *Id.* at 33–35.

¹³⁹ See Green, *supra* note 70 (discussing the strengths and weaknesses of mandatory arbitration); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135, 141 (2000).

¹⁴⁰ Former U.S. Senator Russell Feingold has sponsored legislation which would reverse *Gilmer* and address the use of arbitration in statutory disputes. These legislative attempts have not been successful. See Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 284, 298 (2002).

¹⁴¹ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 108 (2001).

¹⁴² *Id.* at 109–10.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

employment discrimination action against Circuit City.¹⁴³ Circuit City then sued in federal court to enjoin the state-court action and to compel arbitration pursuant to the Federal Arbitration Act (FAA).¹⁴⁴ The District Court entered the requested order.¹⁴⁵ The Ninth Circuit reversed, interpreting the provision of the FAA that excludes from that Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" to exempt all employment contracts from the FAA's reach.¹⁴⁶ The Supreme Court held that the FAA exemption is confined to transportation workers and, as in *Gilmer*, that the mandatory arbitration agreement was enforceable.¹⁴⁷

Thus, the Supreme Court's decisions in *Gilmer* and *Circuit City* further underscore the judiciary's support of alternative dispute resolution and the private resolution of workplace disputes—including individual statutory based disputes. However, as suggested in *Gardner-Denver*, the courts remain concerned about the fairness of such private labor and employment arbitration policies. They continue to examine the procedural and substantive due process elements incorporated in such programs as a condition or basis of deciding whether to enforce what is here called "*Gilmer - Circuit City*" types of mandatory arbitration policies,¹⁴⁸ or to afford labor arbitration decisions varying degrees of evidentiary weight pursuant to *Gardner-Denver*.¹⁴⁹ A

¹⁴³ *Id.* at 110.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Circuit City*, 532 U.S. at 109–10.

¹⁴⁷ *Id.* at 123–24.

¹⁴⁸ *Cole v. Burns International Security Services, et. al.*, 105 F.3d.1465, 1467–68 (D.C. Cir. 1997). See American Arbitration Association, *Employment Due Process Protocol*, May 9, 1995, [hereinafter *Due Process Protocol*], available at <http://www.adr.org/sp.asp?id=28535>. The Due Process Protocol was established in 1995 by individuals representing labor, management, employment, civil rights organizations private administrative agencies, government and the American Arbitration Association. It was amended, effective November 1, 2002. See also Laurie Leader & Melissa Burger, *Let's Get a Vision: Drafting Effective Arbitration Agreements In Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMPL. RTS. & EMP. POL'Y J. 87, 107–08 (2004).

¹⁴⁹ The *Gardner-Denver* Court left the door open for the trial courts to afford an arbitral award varying degrees of evidentiary weight. Specifically, the Court stated:

We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the

number of employers have also attempted to impose mandatory arbitration policies on bargaining unit employees in the union setting; however the law is not settled on whether an employer lawfully may do this unilaterally and without bargaining with the union.¹⁵⁰ It is also worth noting that the EEOC has changed its position over time in regard to mandatory arbitration programs. The Supreme Court held in *EEOC v. Waffle House* that the existence of a private mandatory arbitration agreement does not preclude the EEOC from pursuing an EEOC charge on the agency's own initiative.¹⁵¹

4. *14 Penn Plaza v. Pyett*

Recently, the Supreme Court took up the issue of whether an arbitration clause in a collective bargaining agreement that waives covered employees' rights to file statutory discrimination claims is enforceable.¹⁵² Members of the union had entered into an agreement whereby they would submit all employment discrimination claims to binding arbitration.¹⁵³ The agreement further stated that this process be "the sole and exclusive remedy for violations."¹⁵⁴

Several security guards, each of whom was a member of the union and thus bound by the agreement, filed a charge with the EEOC while the union filed a grievance concurrently.¹⁵⁵ The employer asked the district court to demand that the union arbitrate the claim.¹⁵⁶ This request was denied both by

degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Whereas arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.

Gardner-Denver Co., 415 U.S. at 60 n.21.

¹⁵⁰ *ALPA*, 199 F.3d at 479–80 (1999); *cf.* *Capitol/Ford, Inc.*, 2002 WL 265821, #34 (N.L.R.B.G.C.) (2002).

¹⁵¹ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 281 (2001).

¹⁵² *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 253.

¹⁵⁶ *Id.*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

the trial court and on appeal.¹⁵⁷ In reversing the appellate court, the U.S. Supreme Court held in a 5-4 decision that “a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.”¹⁵⁸ The Court stated that *Gardner-Denver* “does not prohibit collective bargaining for arbitration of ADEA claims,”¹⁵⁹ and it distinguished between contract and statutory rights.¹⁶⁰

Most relevant to this article, however, is the Court’s reaffirmation of alternative dispute resolution as a beneficial mechanism to settle workplace discrimination disputes. The opinion repudiated prior notions established in *Gardner-Denver* that arbitration was a flawed forum, saying “[t]hat scepticism . . . rested on a misconceived view of arbitration that this Court has since abandoned.”¹⁶¹

C. Governmental Endorsement of Anti-Discrimination Statutes and ADR in the Workplace

Congress and the executive branch have also recognized the importance and value of using alternative dispute resolution mechanisms. The EEOC and the NLRB have enacted policies and issued regulations designed to use ADR’s potential, whereas Congress has passed legislation promoting its benefits.

1. EEOC ADR Statement of 1995

In 1995, the EEOC adopted its policy statement on alternative dispute resolution, stating that ADR “can provide faster, less expensive and contentious, and more productive results in eliminating workplace discrimination, as well as in Commission operations.”¹⁶² The Commission outlined four core guiding principles for its use of ADR.¹⁶³ First, any ADR program must further the mission of the EEOC, which it describes as a dual

¹⁵⁷ *14 Penn Plaza*, 556 U.S. at 253–254.

¹⁵⁸ *Id.* at 273.

¹⁵⁹ *Id.* at 259 n.6.

¹⁶⁰ *Id.* at 268.

¹⁶¹ *Id.* at 265.

¹⁶² EEOC Statement, No. 915.002 (Jul. 17, 1995), available at <http://www.eeoc.gov/policy/docs/adrstatement.html>.

¹⁶³ *Id.*

mandate of “vigorously enforcing federal laws prohibiting employment discrimination and resolving employment disputes.”¹⁶⁴ Second, any ADR program must be fair in both reality and perception. This includes ensuring the process has the following elements: voluntariness, neutrality, confidentiality, and enforceability.¹⁶⁵

The third guiding principle is the notion that any ADR program must be flexible enough to respond to the diversity of challenges faced by the Commission and its individual offices.¹⁶⁶ One size does not fit all in terms of implementing programs across the country. The fourth and final guiding principle recognizes the need for training and constant evaluation of the effectiveness of ADR programs through the EEOC.¹⁶⁷

2. The Alternative Dispute Resolution Act (ADR) of 1998

Following a decade of experimentation with ADR, Congress passed the Alternative Dispute Resolution Act of 1998.¹⁶⁸ This Act directed all United States district courts to develop, by local rule, alternative dispute resolution procedures for civil cases.¹⁶⁹ The courts were also given the option of making participation in these programs mandatory.¹⁷⁰ Even if the district courts did not choose to do so, each one must at least “require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation.”¹⁷¹

In passing this bill Congress outlined its reasons for favoring ADR:

Congress finds that --

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ 28 U.S.C.A. §§ 651–658 (West 2011).

¹⁶⁹ *Id.* § 651(b).

¹⁷⁰ *Id.* § 652(a).

¹⁷¹ *Id.*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, mini-trials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.¹⁷²

The ongoing experiment with court-connected ADR programs has been a hot topic in recent research.¹⁷³

3. *NLRB Deferral To Labor Arbitration Policies*

Although the National Labor Relations Act (NLRA) does not expressly spell out its relationship with ADR, Section 10(a) of the Act provided the prelude.¹⁷⁴ In this section, the National Labor Relations Board is given exclusive authority to adjudicate unfair labor practices under the Act.¹⁷⁵ It has used this authority for decades by allowing for arbitration deferrals in

¹⁷² H.R. 3528, 105th Cong. (2nd Sess. 1998).

¹⁷³ See, e.g., Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 551 (2008) (arguing "that courts should aim to gain greater clarity about disputants' preferences, and work to deliberately implement those preferences"). See generally Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004) (advocating the increased use of mediation as a complement to courts' traditional roles of facilitating justice); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 69 (2002) (proposing the use of "dispute system design principles to develop policies satisfying the interests of stakeholders in court-connected mediation programs"); Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768 (2001) (suggesting ways for the Act to uphold the integrity of alternative dispute resolution processes throughout implementation).

¹⁷⁴ 29 U.S.C.A. §§ 160(a) (West 2011).

¹⁷⁵ *Id.*

lieu of deciding unfair labor practices (ULPs).¹⁷⁶ In a landmark case, *Spielberg Manufacturing*, the Board set out its template for post-arbitration deferral.¹⁷⁷ Four workers had been terminated for picket-line misconduct and the case went to arbitration.¹⁷⁸ Following hearings where the union and the four workers actively participated, the arbitration panel denied the grievance.¹⁷⁹ The union and the workers then filed ULP charges with the Board, which ultimately dismissed the complaint.¹⁸⁰ In its decision, the Board stated that it was deferring to the arbitration panel's decision and would continue to do so where: (1) the proceedings appear to have been fair and regular; (2) all parties had agreed to be bound; and (3) the decision of the arbitration panel was "not clearly repugnant to the purposes and policies of the Act."¹⁸¹ In subsequent Board decisions, a fourth prong was added: that the ULP issue must have been addressed and considered by the arbitrator(s).¹⁸²

The Board also has a policy on pre-arbitration deferrals, first outlined in *Collyer Insulated Wire*.¹⁸³ This doctrine requires that: (1) an employer and a union have a collective bargaining agreement providing for final and binding arbitration; (2) the employer is willing to arbitrate the grievance if necessary; (3) the employer agrees to waive any time limitations for filing charges with the Board; and (4) the substance of the charges will be addressed through the grievance procedure.¹⁸⁴ Also in the pre-arbitration phase, though under somewhat differing circumstances, is the deferral situation formed in *Dubo Manufacturing Corp.*¹⁸⁵ Unlike *Collyer* deferrals, *Dubo* deferrals are appropriate where the grievance process has already begun.¹⁸⁶ The Board postpones its determination on the ULP charges pending completion of the

¹⁷⁶ The U.S. Supreme Court acknowledged the Board's authority to do this in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (citing *International Harvester Co.*, 138 NLRB 923, 925-26 (1962)).

¹⁷⁷ *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1091 (1955).

¹⁷⁸ *Id.* at 1083-1081.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1081-82.

¹⁸¹ *Id.* at 1082.

¹⁸² See, e.g., *Olin Corp.*, 268 NLRB 573 (1984).

¹⁸³ *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

¹⁸⁴ *Id.* at 842-43.

¹⁸⁵ *Dubo Manufacturing Corp.*, 142 NLRB 431, 432 (1963).

¹⁸⁶ *Id.* at 433.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

grievance process.¹⁸⁷ If at any time the grievance was no longer pursued, the Board would resume its investigation.¹⁸⁸

V. THE POTENTIAL UTILITY OF PRIVATE STATUTORY TOLLING AGREEMENTS

There are a variety of reasons related to the decision of workers to file either an EEO charge or law suit.¹⁸⁹ There are also a variety of reasons related to the decision of EEO claimants and respondent employers to elect the use of voluntary mediation and also to subsequently possibly settle the matter at hand.¹⁹⁰ The decisionmaking process of EEO litigants is an area that warrants systematic empirical research;¹⁹¹ however, for the purposes of this article, the authors submit that generally workers, and EEO complainants in particular, are more inclined and interested in seeking alternative means of resolving their EEO based claims, or for that matter, any workplace statutory-based claims as opposed to pursuing the very psychologically and economically costly formal litigation route.¹⁹² Empirical evidence suggests, however, that employer respondents generally are considerably less inclined and interested in seeking resolution of workplace disputes through mediation.¹⁹³ This reality may be based on the “proximate employee and employer relationship” and the general existence of an “imbalance of power” in the employment relationship.¹⁹⁴ Anecdotal evidence also suggests that

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 49, 49–57 (1984).

¹⁹⁰ Lamont E. Stallworth & Linda Stroh, *Who Is Seeking To Use ADR? Why Do They Choose To Do So*, 51 DISP. RESOL. J. 30, 30–58 (1996).

¹⁹¹ The author is planning an empirical study to examine the decisionmaking process of EEO litigants in regard to such issues as: the decision to use internal organizational dispute resolution protocols or procedures; the relative degree of interest of the complainant regarding the retaining of one’s position as opposed to accepting some type of “buyout”; and the preference for utilizing ADR processes such as ombudspersons, external neutral investigators, and mediators, as well as arbitrators.

¹⁹² See, e.g., Stallworth & Stroh, *supra* note 190, at 30.

¹⁹³ See Stroh & Stallworth, *supra* note 192, at 30–58; see also Arup Varma & Lamont E. Stallworth, *Barriers to Mediation*, 55 DISP. RESOL. J. 30, 32–45 (2000).

¹⁹⁴ Power imbalance may be described within the framework of the proximate relationship between an employer and employee where, for example, the employer has

employers generally would rather “litigate” or “buy out” and EEO complainant as opposed to resolving the underlying matter and possibly maintaining the employment relationship.¹⁹⁵ In such cases, the actual “act of seeking external redress” becomes more of the basis for the desire to terminate the employment relationship rather than the complainant-worker exercising “external voice.”¹⁹⁶ This dynamic and reality is what the authors refer to as the “file a charge or lawsuit and lose your job paradigm.”¹⁹⁷

A. Private Statutory Tolling Agreements and Organizational Diversity Policies

Given this reality, the authors suggest here that as a matter of responsible organizational policy, as well as sound public policy, employers and public policymakers, particularly federal and state government contractors, should consider establishing policies which afford workers a legitimate, fair, and non-retaliatory means for exercising “EEO voice” by adopting what the authors call voluntary and “tolling agreements.”

B. The Essential Elements of Private Statutory Tolling Agreements

The proposed private tolling agreements and related organizational conflict management policies would operate as follows and contain the following essential elements:

1. Restatement by parties that the parties knowingly, willingly, and voluntarily enter into the private tolling agreement.

both the superior economic strength as well as legal knowledge which far outweighs the considerably lesser economic resources and legal knowledge of the worker or employee.

¹⁹⁵ This results in what the author has called the “file a complaint, lose your job paradigm.” From the employers perspective the decision to resolve an EEO and employment dispute may be viewed as primarily resolving and eliminating a “business problem.”

¹⁹⁶ See ALBERT HIRSCHMAN, EXIT VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATION, AND STATES (1970) (For an interesting and now famous book regarding the exercising of voice). See also Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why? An Empirical Portrait of the Litigious Worker*, 1 U. ILL. L. REV. 115, 116–30 (1981).

¹⁹⁷ See Lamont E. Stallworth, *Employing the Law To Provide Early Access To Conflict Management Systems and ADR: The National Employment Dispute Resolution Act: (NEDRA)* (2009) (unpublished manuscript).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

2. Reaffirmation that the parties shall comply with Agreement in “good faith” and also seek resolution of the dispute in good faith, i.e. “A Good Faith Pledge.”
3. Parties have a right to fact-finding and limited discovery. These private tolling agreements would constitute a “time out,” or what the authors call an “ADR cooling off period,” during which the use external (or trusted internal) fact-finders, ombudspersons, “trusted insiders,” mediators, and arbitrators can be retained to assist the EEO/employment disputes to resolve the involved dispute.
4. Parties agree to the timely exchange of requested relevant documents prior to external fact-finding or mediation, for example twenty-one (21) days.
5. The organization may impose sanctions against individuals who knowingly provide false statements during the course of the investigation, mediation, and arbitration of any claim submitted to this process. Sanctions may include but not be limited to discipline up to and including termination of employment.
6. No retaliation pledge and agreement protecting any individuals who participate in the ADR process.
7. Specific time period for the commencement and expiration of private tolling agreement.
8. Any settlement of the dispute shall be in writing and the settlement shall be final and binding and enforceable in a court of competent jurisdiction.
9. The worker claimant shall have a reasonable period of time (e.g. 21 calendar days) to consult an attorney before the tentative settlement becomes final and binding absent any objections.
10. If the instant dispute is not resolved, the claimant may subsequently and timely file a claim or lawsuit with the appropriate state or federal agency or court.

C. Private Statutory Tolling Agreements

Both the ADR provisions of the Americans with Disabilities Act, the Civil Rights Act of 1991, and various other ADR public policies encourage and support the use of ADR as an alternative to good faith traditional litigation. Accordingly, it is fair to conclude that the fair and careful design and implementation of enforceable “private statutory tolling agreements” is a logical extension and means to encourage and incentives EEO/employment

disputants to encourage attempt to resolve a wide variety of workplace dispute without costly litigation.

There is some anecdotal evidence that private statutory tolling agreements are already used on an ad hoc basis; however there is arguably a need for a change in the law to reverse or clarify any court decisions or EEO policies which raise questions regarding the appropriateness and court enforceability of such private statutory tolling agreements. However, the authors hasten to point out that one of the findings of an earlier empirical study is that the availability, indeed timely use or access to ADR, enhances the probability or likelihood that a workplace dispute will be successfully resolved and settled.¹⁹⁸ Accordingly, the authors are of the opinion that the use of law to encourage, or quite frankly, "direct participation" in ADR either at the pre-charge and lawsuit stage or post charge and lawsuit stage would serve to better effectuate EEO/employment ADR policies and the overarching purposes and policies of our various EEO/employment laws.

VI. THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT (NEDRA)

One of the constant themes and concerns expressed throughout this Article is the need to make internal conflict management systems available at

¹⁹⁸ See, e.g., Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective on Resolving Disputes*, 21 HAMLINE L. REV. 261, 261-62 (1998) (encouraging use of mediation to resolve employment disputes especially if companies change their culture of conflict resolution); Johnathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 150-56, 168-69 (1999) (tracing the emergence of mediation as a method to resolve employment disputes and supporting the use of mediation in resolving sexual harassment claims); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431 (1996) (describing the benefits of using mediation to resolve disability discrimination claims brought pursuant to the Americans with Disabilities Act); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 597-604 (identifying the potential value of mediating Title VII claims); Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2510-33 (1997) (advocating use of mediation in sexual harassment disputes). The EEOC's mediation program for employment discrimination disputes has been highly touted. See Nancy Montwieler, *EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements*, 29 DAILY LAB. REP. (BNA) C-1 (Feb. 12, 1999) (discussing the EEOC's efforts to increase the use of mediation to resolve charges and how the EEOC's mediation program operates).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

the earliest practicable stage of an employment dispute. Despite the favorable settlement rates of the EEOC mediation program, however, the human stories behind these settlements might not paint an equally favorable portrait. Specifically, by the time an EEO dispute has risen to the level of the EEOC mediation program, four realities are likely to exist: (1) the charging party has probably lost his or her job; (2) the charging party has felt compelled to file an external EEO charge or lawsuit; (3) the employer and perhaps the charging party have expended a considerable amount of time, emotion, and money related to the dispute; and (4) as suggested earlier, even though the matter at hand might be “settled” and the case file closed, the charging party has forfeited his or her employment with the defendant employer as a condition of obtaining a settlement and providing a release and waiver of any future related claims.

This reality is troublesome and problematic because, again, this is not how the drafters of Title VII envisioned the Act to operate. It also runs contrary to the public interest in promoting diversity in our society and creating organizational cultures that are “diversity competent.” The early access to legitimate internal conflict management systems, particularly integrated conflict management systems, would greatly serve to avoid this situation. This again is one of the underlying purposes of the National Employment Dispute Resolution Act.

A. Rationale Behind NEDRA

Based upon these realities and the urging of others, a congressional bill entitled the National Employment Dispute Resolution Act of 2000 (NEDRA) was introduced in the House on June 7, 2000.¹⁹⁹ NEDRA required federal contractors having contracts of \$200,000 or more and 20 or more employees to establish internal dispute resolution programs that would, among other things, provide for the early opportunity to internally resolve EEO and other workplace disputes—ideally prior to the filing of a formal charge or lawsuit.²⁰⁰

Where the dispute is not satisfactorily resolved internally, the employee would have the option to use an outside professional mediator—similar to the

¹⁹⁹ National Employment Dispute Resolution Act of 2000 (NEDRA), H.R. 4593, 106th Cong. (2000), available at <http://thomas.loc.gov/cgi-bin/query/z?c106:H.R.+4593:#>.

²⁰⁰ *Id.* § 6(a)(1).

REDRESS program of the U.S. Postal Service—to assist the disputants.²⁰¹ The federal contractor would subsidize the cost of the mediator (i.e., mediator's fees and related reasonable expenses).²⁰² The disputants would also be permitted to enter into a private tolling agreement and reasonable attorney's fees may be part of any settlement.²⁰³ There are a number of issues to be identified and addressed related to NEDRA. It is contemplated, however, that these issues would be resolved in the adoption of any related rules and regulations.

B. Goals and Objectives of NEDRA

In light of the historical use of private dispute resolution processes in resolving race and gender disputes, such as labor arbitration; the public policy encouraging, if not favoring, the use of mediation; the documented economic and psychological costs related to EEO and employment litigation; and given the positive experience with EEO mediation, NEDRA was introduced by Congresswoman Eva Clayton (D-North Carolina). (Appendix B).²⁰⁴

The fundamental goals and objectives of NEDRA are as follows:

1. To assist in the effectuation of the public policy and ADR legislation encouraging the use of ADR, particularly mediation of EEO and other employment disputes and “statutory-based diversity disputes.”
2. As a matter of public policy and possible Presidential Executive Order, to require covered federal and possibly state contractors to offer mediation to resolve EEO and other employment disputes at an early stage.
3. As a matter of public policy, to effectively require a covered federal contractor, and disputing worker to attempt to resolve EEO and other employment disputes, using the assistance of a third-party neutral, i.e., a mediator “where appropriate.”

²⁰¹ *Id.* § 6(b)(1)(A).

²⁰² *Id.* § 3(bd).

²⁰³ *Id.* §§ 3(bd), 6(b)(5).

²⁰⁴ National Employment Dispute Resolution Act of 2000 (NEDRA), H.R. 4593, 106th Cong. (2000), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.04593:#>. (Appendix B).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

4. To promote the voluntary resolution of EEO and employment disputes using a legal concept similar to the “duty to bargain” but facilitated by the use of a third-party neutral, i.e., a mediator.
5. Participation in mediation may be required; however, all settlement outcomes are “strictly voluntary.”
6. To promote the establishment and implementation of internal dispute resolution systems which are fair, regular, and cost-effective and recognize the traditional proximate relationship between employers and workers and possible existence of an imbalance of power.
7. To fashion a cost-effective and fair dispute resolution system that does not place an “undue burden” on either employers or workers.
8. To provide an alternative to workers which permits them the real opportunity to resolve employment disputes internally without the necessity of filing external charges, and pressure and/or lawsuits while still preserving their recourse under the public policies prohibiting discrimination and the public policy favoring ADR.
9. To decrease the number of charges and lawsuits filed with the administrative agencies and the courts.

C. Benefits of NEDRA

The National Employment Dispute Resolution Act offers the following benefits:

1. Applicable statute of limitations is tolled.
2. Enhance probability of continued employment relationships.
3. Certified and qualified private and federal (FMCS) mediators may be used.
4. Includes “certified” Federal Mediation and Conciliation Service (FMCS), state and private mediators, and “certified” ADR providers, in a required public/private partnership.
5. Mediation provides early settlement at less economic and psychological cost to all parties, EEO agencies, and the courts.
6. Mediation and the use of an ombudsperson provide confidentiality.
7. The mediator’s fee is subsidized by the covered federal contractor.
8. “Required,” “directed,” or “mandated” participation in mediation will significantly increase the use of mediation, invariably increasing the number of voluntary settlement agreements, thereby decreasing the number of formal charges and lawsuits.

9. NEDRA would increase the early use of mediation and direct negotiations and thus decrease the number of EEO charges and lawsuits filed. It would promote judicial efficiency by giving employers and employees an early opportunity to “problem solve” disputes, which in many instances are based on misperception, misunderstanding, and miscommunications as well as unconscious and subtle discrimination.
10. NEDRA would further effectuate the purposes and objectives of our various federal and state EEO laws and provide a more civilized and humane way to resolve EEO workplace disputes.

D. Mandated vs. Voluntary Participation In ADR

The cornerstone of NEDRA is the “directed participation” in mediation, where, after the exhaustion of certain internal procedures, the worker will have the option to submit the matter to mediation. Any settlement, however, would be voluntary.

Classic mediation generally works best where participation in the process is strictly voluntary. This appears to be the underlying philosophy of the ADR provisions of the Americans with Disabilities Act, the Civil Rights Act of 1991, and the EEOC’s ADR Public Policy Statement. There is not considerable legislative history related to the ADR provisions of Americans with Disabilities Act or the Civil Rights Act of 1991. Consequently, one cannot state with unequivocal certainty what the drafters of these provisions contemplated, or if they would have rejected the use of directed participation in mediation, permitting only voluntary settlement outcomes.

However, there is sufficient empirical and anecdotal evidence that directed participation in mediation (with only voluntary settlement outcomes) is effective, using measures of satisfaction with the process and outcome as indicators.²⁰⁵ Empirical research studies indicate that settlement rates and party perceptions of fairness are often comparable in both mandatory and voluntary programs.²⁰⁶ In one study on mandated participation in mediation

²⁰⁵ See, e.g., Jeanne M. Brett, Zoe I. Barsness & Stephen Goldberg, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259, 259–68 (1996).

²⁰⁶ *Id.*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

by Professors Jeanne Brett and Stephen Goldberg, the researchers found the following:²⁰⁷

1. Settlement rate (78%) and degree of satisfaction are similar for both voluntary and mandated mediations.
2. Agreement in construction mediation was as likely in mandatory mediation as voluntary mediation.
3. The distinction between “compulsion” to enter mediation and “compulsion” to settle mediation is crucial—only the latter is inconsistent with mediation.
4. Mandatory settlement rates seem to resemble those of voluntary programs.
5. Legal rules that emphasize voluntary use of mediation can reinforce barriers to access, while one party can force another to respond to a lawsuit.²⁰⁸

Notwithstanding the apparent effectiveness of ADR, there still remains an under-utilization of internal conflict management systems, particularly at the early pre-charge/lawsuit stage of employment disputes. A number of state and federal district courts and courts of appeal have attempted to address the reluctance of EEO litigants to use mediation by mandating participation of the litigants in mediation²⁰⁹ or in some form of non-binding arbitration.²¹⁰ In

²⁰⁷ *Id.* See also Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 576–77 (1997) (finding that based upon empirical analysis of small claims and common pleas court cases that mandatory versus voluntary mediation has little difference in terms of case outcome and participant evaluation, and also demonstrated that there is little difference in outcome between mandatory versus voluntary mediation based upon the race or sex of the litigants).

²⁰⁸ Brett, *supra* note 205, at 261–62.

²⁰⁹ See generally John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices*, 14 OHIO ST. J. ON DISP. RESOL. 813 (1999) (discussing courts mandating participation in mediation); Susan C. Kuhn, Book Note, *Mandatory Mediation: California Civil Code Section 4607*, 33 EMORY L.J. 733 (1984) (examining the California statute in terms of, among other problems that might arise from the implementation of mandatory mediation); John G. Mebane, III, Book Note, *An End to Settlement on the Courthouse Steps? Mediated Settlement Conferences in North Carolina Superior Courts*, 71 N.C. L. REV. 1857, 1857–1859 (1993); Kelly Rowe, Book Note, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated*, 34 EMORY L.J. 855, 856–858 (1985); David S. Winston, Book Note, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water. . . .”*, 11 OHIO ST. J. ON DISP. RESOL. 187, 188–90 (1996). See also Gary Smith, *Unwilling Actors: Why Voluntary Mediation Works. Why Mandatory Mediation Might Not*, 36 OSGOOD HALL L.J. 847 (1998) (examining the

those instances where state and federal courts have mandated participation in mediation, any settlement outcome was voluntary. One of the cautionary notes or caveats is that ADR is not presented here as a “panacea” for the resolution of workplace civil rights disputes, nor do we recommend that all Title VII cases should be resolved short of a trial.²¹¹

There are also a number of thoughtful scholars and practitioners who have expressed their concerns about ADR and its potential negative impact on women and racial minorities.²¹² There is a related concern that there may

hypothesis that mandatory mediation will not operate in the same way as voluntary mediation).

²¹⁰ McCrory, *supra* note 209, at 815 (discussing the Ohio and Georgia mandatory mediation court programs because these programs were underutilized when they were voluntary).

²¹¹ For articles discussing the pros and cons of private enforcement of statutes, see Robert Belton, *A Comparative Review of Public and Private Public Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 961 (1978) (discussing the pros and cons of private enforcement of statutes); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1384–1453 (2000). See generally Michael Selmi, *Public v. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401 (1998) (containing a “comparative empirical analysis of the effects of private versus public enforcement of civil rights”). For articles critical of mediation and other ADR processes, contending that such processes negatively affect access to the public justice system, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (contending that mediation and other ADR processes negatively affect access to the public justice system); Isabelle R. Gunning, *Diversity Issues In Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55, 61–62 (1995); Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 255, 302–03 (1987); Ralph Nader, *The Corporate Drive to Restrict Their Victims’ Rights*, 22 GONZ. L. REV. 15, 20–21, n. 211 (1986). But see, Book Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1095, 1104 (1990). See generally Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); see generally Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211 (1995) (mapping the changing attitudes toward ADR and adjudication).

²¹² There is an increasing amount of research discussing the potential negative impact which ADR, mediation, and other informal dispute resolution processes either might have or do have on weaker parties such as racial minorities and women. See, e.g., Rebecca E. Zietlow, *Two Wrongs Don’t Add Up to Rights: The Importance of Preserving Due Process In Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1111–14 (1996). See also Stephen Meili & Tamara Packard, *Alternative Dispute*

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

be a trend of establishing a type of “ADR for the Wealthy” and “ADR for the Poor.”²¹³ Serious consideration should be given to these concerns and the appropriate steps should be taken to address them. The Society of Professionals in Dispute Resolution, in its report entitled “*Guidelines for the Design of Integrated Conflict Management Systems within Organizations*,”

Resolution in a New Health Care System: Will It Work for Everyone?, 10 OHIO ST. J. ON DISP. RESOL. 23, 30–35; Beryl Blaustone, *The Conflicts of Diversity, Justice, and Peace in the Theories of Dispute Resolution*, 25 U. TOL. L. REV. 253, 259–61 n.17 (1994) (describing a study conducted by Professor Michele Hermann that found claimants of color received less money from mediation than in the courts, even though they were more satisfied with the mediation process, and also finding that women did not experience any monetary difference between mediation and the courts but women were much less satisfied with mediation versus the courts); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 467–68 (1991); LaFree & Rack, *supra* note 90, at 770. See generally Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study*, 20 HAMLINE J. PUB. L. & POL’Y 211, 211–12 (1999). See also JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 144 (1983).

²¹³ *Who is Seeking to Use ADR?*, *supra* note 190, at 30–31 (noting the tremendous hardships placed on claimants by the EEOC’s backlog and discussing how justice may be denied due to the increasing backlog); Zietlow, *supra* note 212, at 1114–21 (asserting that low-income women, particularly those of color, do not fare well in informed processes); see also Meili & Tamara, *supra* note 212, at 30–35 (describing problems with ADR for women, minorities and the poor); but see Blaustone, *supra* note 212, at 261 n.17 (pointing out that the argument of Delgado is not supported empirically); Gunning, *supra* note 211, at 86–93; LaFree & Rack, *supra* note 90, at 770; Rosenberg, *supra* note 212, at 467–68 (asserting that Professor Grillo’s account of mediation only refers to those few bad cases and ignores good mediation experiences); see generally Rack, *supra* note 212, 261–62 (describing data from prior study and analyzing the negative effects in bargaining differences for ethnic minorities, women, and those with limited bargaining power in mediation conducted on interest-based facilitative principles); Fiss, *supra* note 211, at 1076–77 (arguing that ADR creates a second class system of justice where the wealth of the parties dictates the type of justice involved because the rich do not have to settle for anything less than the court system). See also Auerbach, *supra* note 212, at 144 (arguing that alternative dispute resolution creates a two-tier system of justice with ADR being used by the poor and the weak with weaker procedures and protections than the court system which the rich still may pursue); Thomas A. Kochan et al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 245, 277 (2000) (describing wealth bias problems associated with Massachusetts Commission Against Discrimination mediation program which required a payment of a fee and legal representation); Peter S. Adler et al., *Guidelines for Voluntary Mediation Programs Instituted by Agencies Charged with Enforcing Workplace Rights* (Apr. 21, 1998), <http://www.mediate.com/articles/spwork.cfm> (noting that SPIDR agreed that the wealth of the participants should not matter in an agency run program).

has made an attempt to address a number of these concerns and provide guidance to public policymakers and decisionmakers within organizations.²¹⁴ Cornell University Professors David Lipsky and Ronald Seeber have also extended the guidelines of the SPIDR Report in their book entitled *Emerging Systems for Managing Workplace Conflict*.²¹⁵ There are, however, particular areas of concern that warrant immediate attention. These include: (1) assuring competent legal representation and addressing the existence of the imbalance of power; (2) assuring the actual use of a diverse corps of workplace dispute resolvers; and (3) keeping down the costs of ADR.

VII. STRATEGIC ENACTMENT OF NEDRA

A. *Experiential-Based Rationale for NEDRA and the Role of Politics*

The experiential evidence shows that internal conflict management systems have been generally effective in resolving workplace disputes, including employment discrimination disputes, within contemporary times.²¹⁶ The challenge now is how the federal government can most effectively advance the use of conflict management and ADR to further complete or fulfill the “Unfinished Work of Title VII.” One appropriate strategy would be the enactment of NEDRA as Congressional legislation, or as a Presidential Executive Order, which would require federal contractors to implement internal conflict management systems and provide EEO disputants early access to ADR, mediation, and voluntary arbitration, as a matter of good public policy.²¹⁷

NEDRA, or legislation fashioned similar to NEDRA, would be only one weapon in the arsenal to address forms of overt, unconscious, and subtle discrimination in the workplace. NEDRA might also serve to address the phenomena of bullying in the workplace. Furthermore, although one would like to believe that there is a “convergence of interest” among some

²¹⁴ SPIDR’s ADR in the Workplace, Track I Committee, *Guidelines for the Design of Integrated Conflict Management Systems within Organizations*, (August 2, 2000), <http://www.mediate.com/articles/spidrtrack1.cfm>.

²¹⁵ LIPSKY & SEEBER, ET AL., *supra* note 77, at 11–12.

²¹⁶ See, e.g., Jean T. McKelvey, *Sex and the Single Arbitrator*, 24 INDUS. & LAB. REL. REV. 335, 346–52 (1971).

²¹⁷ Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 864 (1997).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

employers and “fair-thinking individuals” committed to the principle of diversity in the workplace,²¹⁸ this will not in itself lead to the completion of “The Unfinished Work of Title VII.” The interest-convergence principle, as argued by Professor Michael Green, will not likely lead to employers voluntarily implementing legitimate conflict management systems.²¹⁹ Research suggests that many, if not most employers are prompted to design and implement such employment policies primarily as a result of a costly lawsuit and resulting verdict and public exposure.²²⁰ Economics, not good will or ethics, is the precipitating and driving factor behind such decisions.²²¹ Indeed, but for *Brown v. Board of Education*, Title VII, Executive Order 11246, and various Supreme Court decisions supporting integration and diversity in the workplace, the demographic profile of the U.S. workforce

²¹⁸ See Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L. J. 937, 958 n.109 (2005) (suggesting that a priority be placed on interest-convergence while there is such a division in the country around issues of race and no key political support for civil rights); Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L. J. 795, 810 n. 81 (2004) (describing interest convergence as asserted by Professor Derrick Bell who ‘suggests that beyond whatever moral arguments may have swayed elites in favor of desegregation, pragmatic concerns in the post-World War II political and social climate ultimately led White elites to support desegregation’); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 533 (1980); Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (discussing the definition of interest conveyance and asserting that “[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interest of white”). See also Richard Delgado, *Explaining The Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 371 (2002).

²¹⁹ See generally, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma* 93 HARV. L. REV. 518 (1980) (for a discussion on the interest-convergence principle); Justine Driver, *Rethinking The Interest – Convergence Thesis* 105 NW U. L. REV. 149 (2011). See also Colloquy, “Do the Right Thing: Understanding the Interest – Convergence Thesis, NW. U. L. REV. (Stephen M. Feldman ed.) (2011).

²²⁰ LIPSKY & SEEBER, *supra* note 77, at 228–29.

²²¹ The employment of the law has often been used to change behavior. Laws requiring the wearing of seat belts, prohibition of smoking in restaurants, and indeed Title VII and Exec. Order No. 11246, 30 FR 12319 (Sept. 24, 1965) are clear examples supporting this point.

would not look like it does today.²²² Although law might not change attitudes, laws can change behavior.²²³

Notwithstanding any concern about today's Congressional political climate,²²⁴ perhaps those employers who are referred to as "diversity competent organizations" would see the value of conflict management systems and strive to also become "conflict competent organizations." Perhaps these same employers, many of whom are federal contractors, would also support a Presidential Executive Order enacting NEDRA. It will, however, require an "interest-convergence" to implement successfully the goals and objectives of NEDRA, either legislatively or on a voluntary basis.²²⁵

B. Congressional Legislation and the Presidential Executive Order

There has been a long-standing history of enacting public policy by the use of Presidential Executive Orders.²²⁶ For example, the Drug Free Workplace Act²²⁷ and Executive Order 11246 are just two examples of Presidential Executive Orders affecting certain public policies in the workplace.²²⁸ Simply stated, the theory and impetus behind Presidential

²²² See *Mitsubishi; Women's Suit on Harassment Goes to Mediation*, CHI. TRIB., May 21, 1997, at B2 (detailing the exclusion and underutilization of women and racial minorities as workplace neutrals). See also Margaret Jacobs, *Riding Crop and Slurs: How Wall Street Dealt with a Sex-Bias Case*, WALL ST. J., June 9, 1994; Margaret Jacobs, *Woman Claims that Arbiters of Bias Are Biased, Too*, WALL ST. J., Sept. 19, 1994; Steven A. Holmes, *Arbiters of Bias in Securities Industry have Slight Experience in Labor Law*, N.Y. TIMES, Apr. 5, 1994, at B6; Barry Winograd, *Men As Mediators in Cases of Sexual Harassment*, 50 DISP. RESOL. J. 40, 43 (1995). Also, for an article discussing the likelihood of discriminatory arbitration selection in light of the increased use of employment arbitration, see Sarah Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145, 1158 (2004).

²²³ See generally Blumrosen *supra* note 10.

²²⁴ See Green, *supra* note 69, at 321 (asserting that given the current conservative U.S. Congress it is doubtful that the enactment of civil rights legislation such as NEDRA will be enacted any time soon).

²²⁵ The reach of NEDRA would be quite considerable; however federal contractors and non-federal contractors may also voluntarily adopt and implement the basic elements of NEDRA now.

²²⁶ See *supra* note 7.

²²⁷ Anti Drug Abuse Act of 1988, Pub. L. No. 100 690, 102 Stat. 4181.

²²⁸ *Id.* at § 2101 (requiring federal grantees and contractors to certify that they maintain a drug-free workplace and noting that grantees must establish a written policy

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

Executive Orders are found in Keynesian economics.²²⁹ Specifically, because the federal government is a primary or major purchaser of goods and services, the federal government has the economic power to influence what will be the *quid pro quo* conditions under which the state or federal government will award contracts for goods and services. These *quid pro quo* agreements may also establish the terms and conditions of employment of the workers of covered federal contractors and possibly state contractors. The Drug Free Workplace Act and Executive Order 11246 are good examples of *quid pro quo* Presidential Executive Orders. The proposed National Employment Dispute Resolution Act (NEDRA) would fall under a similar category.

The proposed National Employment Dispute Resolution Act may also be advanced via the conventional Congressional legislative route or perhaps “dual-tracked.” However, because NEDRA would apply only to federal contractors, the enactment of NEDRA as a Presidential Executive Order would meet the “interest-convergence” of cost-conscious, litigation-weary, and fearful employers. Moreover, many U.S. workers would welcome some relatively user-friendly means to resolve statutory based diversity employment disputes²³⁰ and disputes which might have a basis in subtle and unconscious discrimination and perhaps “bullying.”²³¹ It is these types of disputes and reasonable accommodation disability based disputes which are

that informs employees that the unlawful possession, distribution, or manufacturing of a controlled substance in the workplace is prohibited).

²²⁹ Margaret Weir, *Ideas and Politics: The Acceptance of Keynesianism in Britain and the United States*, in *THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS* (Peter A. Hall ed. 1989).

²³⁰ See, e.g., Lamont E. Stallworth & Martin H. Malin, *Conflicts Arising Out of Work Force Diversity*, *Proceedings of the National Academy of Arbitrators* 104, 117–23 (1993).

²³¹ For a review of research by other scholars, see generally McGinley, *supra* note 30, at 415–92. See also *Emerging Cronyism*, *supra* note 36, at 1059; Lawrence, *supra* note 36, at 329–30 (describing how discrimination laws fail to deal with the realities of unconscious racism); Allen, *supra* note 36, at 1299–1304 (asserting that the failure of civil rights laws is related to the reluctance to expand the definition of discrimination to include an objective standard that would address unconscious use of stereotypes); Stallworth et al., *supra* note 36, at 37–43 (arguing that “C” charges should be mediated rather than just dismissed because they could involve unconscious discrimination); see also Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents: Ethical Challenges for Decision-Makers in Organizations*, 8 *EMP. RTS. & EMP. POL’Y J.* 375, 375–405 (2004); Yelnosky, *supra* note 36, at 589–92.

particularly appropriate for early resolution using private fact-finding, mediation, and perhaps voluntary arbitration. Furthermore, notwithstanding assertions made about the current political climate in Washington, D.C.,²³² the advancement of NEDRA presents a “win-win” opportunity for the current—or any future—administration.

VIII. THE NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT MODEL AND THE “EARLY RESOLUTION” OF VETERANS’ DISABILITY BASED REASONABLE ACCOMMODATION REQUESTS

A. The Theoretical Utility and Application of NEDRA

The potential utility of the National Employment Dispute Resolution Act (NEDRA) can be most readily demonstrated if it were applied to cover federal contractors that employ Iraq and Afghanistan War Veterans. Many of these veterans are dealing with military-related disabilities. Some of these disabilities are “visible physical disabilities,” such as the loss of arms and legs. However, an increasing number of these disabilities are what the authors call “non-visible disabilities.” Included among these non-visible disabilities are post-traumatic stress disorder or injuries (or illness), traumatic brain injuries, depression, and diabetes.²³³

A number of non-federal contractor employers, including those employers that would be covered by NEDRA, do not have the knowledge and expertise to effectively understand and handle the work related issues, and need to reasonably accommodate the legitimate needs of veterans with disabilities. In addition, in some, if not many, instances veterans dealing with “non-visible disabilities” might even be suspected of feigning disabilities or being malingerers. This may be particularly the case in instances involving Black/African-American and Hispanic veterans.²³⁴

²³² See, e.g., Green, *supra* note 69, at 321.

²³³ Professor Lamont Stallworth is developing an applied empirical ADR research project to explore the design and implementation of a pilot project affording veterans with disabilities “early access” to “ADA fact-finders and mediators.

²³⁴ There is an increasing awareness that a number of disabilities now covered by the Americans with Disabilities Act, as amended, are not the usual thought of “visible physical” disabilities. In the aftermath of the Iraq and Afghanistan wars many war veterans are returning with such “invisible disabilities” as depression post-traumatic stress disorder, traumatic brain injury, diabetes traumatic mental illness, etc. However, professionals and disability advocate groups are actively educating employers and the general public about this growing area of invisible disabilities areas. See, e.g., Equip for

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

This situation is even further complicated or compounded where veterans with disabilities are not fully aware and knowledgeable of their rights under applicable state and federal disability laws.²³⁵ Furthermore, in many instances, veterans with disabilities may not know what specific modes of effective reasonable accommodations might be available to them in order to facilitate their remaining on the job and maintaining their employment.

Under this scenario, the employer may be more inclined to terminate unnecessarily the employment relationship of a veteran with a covered disability. The veteran with the covered disabilities may be more inclined to “walk away” from his or her position and thus further contribute to the already high unemployment rate of Iraqi and Afghanistan veterans as well as non-veteran disabled individuals, generally.

The authors hasten to point out that in many instances an already emotionally beleaguered veteran may not possess the wherewithal to be his

Equality, *Employment Legal Briefings: Invisible Disabilities and the ADA*, Brief No. 13, (June 2010) (DBTAC Great Lakes ADA Center). The authors suggest here that given the phenomenon of “unconscious bias” that many employers will be (or are) inclined to assume or suspect minority veterans, particularly Blacks and Hispanics as feigning a disability and being malingerers. *See generally* McGinley, *supra* note 30. *See also* McGinley, *supra* note 36 at 1003; Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329-30 (1987) (describing how discrimination laws fail to deal with the realities of unconscious racism); Jessie Allen, Note, A Possible Remedy for Unthinking Discrimination, 61 BROOK. L. REV. 1299, 1299-1304 (1995) (asserting that the failure of civil rights laws is related to the reluctance to expand the definition of discrimination to include an objective standard that would address unconscious use of stereotypes). It is suggested that the involvement of a third party neutral “early on” pursuant to the proposed National Employment Dispute Resolution Act will serve to better and more effectively address this serious problem.

It has been asserted by one experienced plaintiff attorney that there seems to be a pattern of employers challenging reasonable accommodation requests made by racial minorities, particularly Black/African-Americans and Hispanics. The basis of these challenges is that these individuals are feigning disabilities and are malingerers, particularly in cases involving non-visible disabilities such as post-traumatic stress disorder, depression and diabetes. Regretfully, in our society there appears to be a “presumption of wrongdoing” on the part of African Americans. One example of this was the arrest of African American Harvard Professor Henry Louis Gates as he was entering his home in Cambridge, Massachusetts. This regrettable incident became the basis of book by Harvard Law professor Charles Ogletree. *See* CHARLES OGLETREE, *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS AND CRIME IN AMERICA* 129-243 (2012).

²³⁵ *See, e.g.*, The Americans with Disabilities Act Amended, The Vocational Rehabilitation Act of 1973 as well as various state and city disability statutes and policies as well as the Family and Medical Leave Act.

or her own advocate in such situations and consequently elect not to engage his or her employer in what is called the required "interactive process" under the Americans with Disabilities Act Amended and other state disabilities statutes.

B. The Applied and Practical Utility of NEDRA: CAREY SALT COMPANY CASE

One reported instance of the need for the employer cooperation in a reasonable accommodation matter involved the Carey Salt Company. This dispute involved the need of a veteran with disabilities to be away from work in order to obtain medical treatment related to his covered disability. This dispute would have had a significantly better likelihood of being resolved under the proposed National Employment Dispute Resolution Act (NEDRA) model or scheme. Specifically, the involved veteran or veterans could have sought internal redress or assistance via an integrated conflict management system or internal grievance procedure affording the involved veteran to an experienced third party neutral such as an "ADR mediator". Both the covered employer and the involved veteran would (or could) voluntarily enter into a private statutory tolling agreement. This would have provided what the authors call an "ADR Cooling Off Period." During this "ADR cooling off period," the involved veteran would not feel pressured or compelled to seek costly external redress under an applicable state or federal disability law or the FMLA.

Assuming that the covered employer and the involved veteran were to select an experienced and independent workplace neutral (i.e., fact-finder or mediator) who is knowledgeable about the ADAA and various modes of reasonable accommodation, the disputants could have most or more likely engaged in the statutory required "interactive process" early on with less emotional stress, animosity, and monetary costs and more importantly maintained his employment relationship.²³⁶ For some reason, employers and veterans are often not able to arrive at a mutually acceptable mode of reasonable accommodation. Consequently, a number of benefits would have been attained by having "early" access to a third party neutral. These benefits include, but are not limited to, the following:

²³⁶ For an excellent article regarding the practical utility of using a mediator in negotiations, see generally Robert A. Baruch Bush, *What Do We Need A Mediator For?: Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

1. The disputants would spare to cost in terms of time, expense, and acrimony in litigating this matter.
2. The use of a specially trained and experienced “ADA workplace neutral” would have provided a form of “day in court” for both the employee with disability and his or her employer.
3. Other employees and workers with covered disabilities would be provided significant comfort in knowing that there was a “fair and just” internal forum in which their disability based reasonable accommodation requests could be timely resolved without the employee losing his or her employment position.
4. The “early” fair and just resolution of these disputes pursuant to the NEDRA model would serve to better effectuate the Americans with Disabilities Act Amended, particularly the ADR provisions of the earlier Act.

As reported by Veterans For Common Sense: unfortunately, some companies are not upholding their end in accommodating the needs of veterans with disabilities.²³⁷ According to Veterans For Common Sense, veterans are losing their jobs or are put under pressure at work because they seek time to receive service-related care or to serve military deployments.²³⁸ This happens despite the Soldiers and Sailors Employment Act requiring employers to hold a service member’s job when they deploy and to give them time to fulfill military obligations.

CAREY SALT COMPANY FACTS

In January, Carey Salt Company, a subsidiary of Compass Minerals International, Inc., terminated employee Derrick Forestier, a Bronze Star recipient, who retired as a Sergeant First-Class after 24 years in the U.S. Army. Forestier’s tour of duty included three combat tours in five deployments. Forestier sought time off from work to receive required medical treatment at a Veterans’ Administration (VA) facility for a military service-connected issue. The company was notified of this condition before hiring him. Forestier contended that he was fired because the company believed his absences to attend his Veterans’ Administration (VA) appointments created work place problems. The United Steelworkers Union

²³⁷ Team VCS, *VCS Joins with USW to Protect Veterans at Work*, VETERANS FOR COMMON SENSE (July 12, 2012), available at <http://veteransforcommonsense.org/2012/07/12/vcs-joins-with-usw-to-protect-veterans-at-work/>.

²³⁸ *Id.*

became involved in this matter and took up the fight in Louisiana, where Forestier was employed. The Union is currently investigating whether there are other possible cases of mistreatment of veterans by this company in other locations.²³⁹

C. The View of Veterans For Common Sense and NEDRA

The opinion of the Steelworkers Union and the Veterans For Common Sense underscore the practical utility of “early access” to integrated conflict management systems and access to external “ADA fact-finders or mediation” in reasonable accommodation disputes involving veterans.

In the Carey Salt Company case, the authors are of the opinion that the early use of a third party neutral using facilitation, mediation, or even binding mediation would have greatly enhanced the likelihood of accommodating the needs of Derrick Forestier. And in the alternative, a third party neutral using binding mediation could have concluded that the accommodation of Mr. Forestier created an undue hardship for Carey Salt Company. Either way, the reasonable accommodation dispute would have brought some timely and just closure.

The comments of Veterans For Common Sense lend further support for the early access to ADR in Veterans disability reasonable accommodation cases. The comments of this veterans’ organization are set forth below:

Those who serve or have served America in the military have a hard enough job and they sacrificed much for the country. It is not too much to ask an employer that they be given time off to continue to serve or to seek necessary treatment for conditions resulting from their service. We have to protect those who serve if we expect them to protect us when the nation requests it. Support the troops is not just a slogan, this is the right thing to do for our brave men and women.

²³⁹ *Id.* (referencing a letter from Rep. Lloyd Doggett, to J.M. Breau, Director, United Steelworkers District 13, which is on file with the United Steelworkers. Rep. Lloyd Doggett (D-TX), who sponsored the Wounded Veteran Job Security Act to protect veterans from losing their jobs for seeking treatment for service-related conditions, said: “No veteran should have to stand in front of their employer after suffering an injury while serving the red, white, and blue and be given a pink slip. Workers and veterans like Derrick Forestier, an Army Sergeant First Class who served 24 years on active duty, including three combat tours of duty and five deployments, should not be forced to choose between keeping a job or receiving the veteran’s benefits he rightfully earned.” Team VCS, *supra* note 237.).

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

The authors submit that affording veterans with disabilities “early access” to ADR, including workplace neutrals as would be provided by the model of NEDRA, would immediately assist many veterans with disabilities who urgently need and deserve assistance.

IX. CONCLUSION

There are many documented reasons to support affording EEO/employment disputants “early access” to legitimate internal conflict management systems, particularly integrated conflict management systems. From the perspective of worker-complainants, the costs related to defending such claims are substantial. From the workers’ perspective, there is both a considerable economic and psychological cost related to the late and protracted resolution of EEO/employment disputes. This is particularly the case given the difficulties workers have in obtaining legal representation and proving unlawfully motivated discrimination, especially in cases stemming from unconscious, subtle, and modern discrimination. Furthermore, in light of the findings of Professors Eisenberg and Schwab, it appears that even where plaintiffs prevail in a Title VII case, there is a greater probability that his or her favorable verdict will be reversed upon appeal.

In addition, experience tells us that one other practical reality is the dynamic of “file a charge or lawsuit and lose your job,” which has become a general fact of life.²⁴⁰ This is generally the case even where the matter is brought to closure through mediation at the EEOC mediation program stage, where the adage “too little, too late” applies. This result also runs counter to

²⁴⁰ One of the major concerns of employers and their attorneys is that the retention of an individual worker and professional employee who has either filed an EEO charge or law suit will prompt future claims of retaliation or as one experienced employer attorney averred, such employees are cases of “pre-taliation.”

The authors suggest that one strategy to address this very real concern would be for the respondent employer and complaining and retained employee to enter into voluntarily a “pre-dispute” mediation and final and binding arbitration agreement that would require the retained employee to have any and all future employment disputes resolved through the use of mediation and where mediation does not resolve the matter, the dispute shall be resolved through final and binding arbitration as contemplated by the Supreme Court in *Gilmer vs. Interstate Johnson Lane*, 500 U.S. 20 (1991) and *Circuit City vs. Adams* 532 U.S. 105 (2001).

The authors are of the opinion that the voluntary entering into the proposed pre-dispute final and binding arbitration agreement would not constitute “disparate treatment” or retaliation, particularly when weighed against the complaining worker or otherwise “pre-taliation” worker permanently losing employment with his or her employer.

this country's recognition and commitment to diversity in our society and in the workplace. This result further runs afoul of Supreme Court's recognition of diversity as being a matter of "public interest and policy."

Given these realities and the prism which has been etched out in this article, it follows that from a very practical perspective it behooves all of the interested stakeholders, including public policy makers, to appreciate the role which legitimate internal conflict management systems (particularly integrated conflict management systems) can play, as one of the significant factors, in fulfilling the "Unfinished Work of Title VII," and in providing a more meaningful, effective, and practical form of workplace justice. The proposed National Employment Dispute Resolution Act (NEDRA) is just one possible means to effectuate these purposes.

X. APPENDICES

APPENDIX A

An Example of A Model Private Statutory Tolling Agreement

The Undersigned Parties knowingly and willingly enter into the instant "Private Tolling Agreement" freezing the otherwise applicable statutory time limits related to the allegation/claim that the statutory rights of _____ (Name of Individual) arising under the following state or federal statute(s):

_____; _____; and _____ have been violated. The statutory timely filing of this claim or lawsuit would normally commence as of _____ (Date) and expire on _____.

The Undersigned Parties acknowledge that _____ (Name of Individual) has knowingly, willingly, and voluntarily elected to seek redress and resolution of his or her contract grievance and the above-referenced statutory-based claim pursuant to the conflict management and ADR procedures established by ABC Employer (and XYZ labor organization). The Undersigned Parties, including the grievant, further agree that during this period of time any and all relevant documents, including witness statements, shall be preserved and not destroyed and made available to either Party during the period of time set aside for this ADR protocol and thereafter. The Parties also affirm that they have voluntarily elected to seek internal resolution of the instant dispute in "good faith."

The Undersigned Parties further agree that they will engage in "good faith" fact-finding and limited discovery in exchanging any relevant

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

evidence, documents, witness (fact-finding, arbitration, etc.) statements and relevant medical and health records prior to the scheduled mediation and at least twenty-one (21) calendar days prior to the scheduled mediation or ADR session. Where requests are made for medical and health records, the providing of such information shall be made only in compliance with applicable state and federal privacy laws and with the signed release of the individual to whom these records personally apply or his or her family member or domestic partner having such authority.

The Undersigned Parties further agree and affirm that no individual, including the claimant and his or her witnesses or participants in this internal dispute resolution protocol shall be subject to any form of retaliation or discriminatory treatment due to his or her participation in this private internal ADR protocol.

The Undersigned Parties further agree that the time period for which they shall seek to resolve in "good faith" the instant matter pursuant to the applicable ADR procedures shall be between _____ (Date) to _____ (Date), unless otherwise mutually and formally extended.

The Undersigned Parties further agree that any settlement or resolution reached pursuant to the applicable ADR protocol shall be in writing and shall be final and binding upon _____ (Name of individual), _____ (Name) Employer ABC and, where applicable, the Undersigned labor organization representing _____ (Name of Individual).

The Undersigned Parties further acknowledge that each side has been (or will be) afforded a reasonable period of time, not to exceed twenty-one (21) calendar days, to obtain legal advice regarding the instant private tolling agreement. Absent formal written objections being raised, the instant agreement shall take force.

Lastly, the Undersigned Parties agree and affirm that if the instant dispute is not resolved using the agreed upon ADR process and protocol as set forth in that _____ (Name of Individual) shall have _____ days or until _____ (blank date) to file a charge or claim with the state or federal administrative agency or state or federal court having appropriate jurisdiction of the claims raised by _____ (Name of individual). The worker-complainants' failure to timely file such legal actions shall constitute the final waiver of such claims and preclude _____ (Individual) from seeking any further external legal redress or recourse pursuant to any

current collective bargaining agreement or organizational internal grievance and arbitration procedure.

The above terms and conditions constitute the full and final terms of the instant "statutory private tolling agreement."

_____ XYZ Employee	_____ ABC Employer
_____ Date	_____ Date
_____ Notarized	_____ Notarized
_____ Witness and/or Attorney for the Individual	_____ Attorney/Legal Counsel for the Employer
_____ Date	_____ Date
_____ XYZ Labor Organization	_____ Representative of the Grievant
_____ Date	_____ Date

APPENDIX B

The Proposed National Employment Dispute Resolution Act of 2000 (NEDRA)

The Proposed National Employment Dispute Resolution Act of 2000 (NEDRA) 106th Congress, 2d Session, H.R. 4593, to amend title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991, to require the Equal Employment Opportunity Commission to mediate employee claims arising under such Acts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES
June 7, 2000

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

Mrs. Clayton introduced the bill which was referred to the Committee on Education and the Workforce.

A BILL

To amend Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991, to require the Equal Employment Opportunity Commission to mediate employee claims arising under such Acts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “National Employment Dispute Resolution Act of 2000 (NEDRA).”

SECTION 2. FINDINGS.

The Congress finds the following:

- (1) The prohibitive costs and emotional toll of litigation as well as the growing backlog of employment civil rights claims and lawsuits has impeded the protection and enforcement of workplace civil rights.
- (2) Mediation is an economical, participatory, and expeditious alternative to traditional, less cooperative methods of resolving employment disputes.
- (3) Mediation enables disputants to craft creative solutions and settlements, surpassing the reach of traditional remedies, thereby possibly protecting the continuity of the employment relationship.
- (4) As we enter the new millennium, a national program of directed or required participation in mediation where any settlement is voluntary mandated mediation for certain employment and contract disputes, will help fulfill the goal of equal opportunity in work and business places of the United States.
- (5) Overt and subtle discrimination still exists in our society and in the workplace.
- (6) Overt and subtle forms of discrimination cause measurable economic and noneconomic costs to employers and the American workforce, create a barrier to fully realizing equal opportunity in the workplace, and are contrary to public policy promoting equal opportunity in the workplace.

(b) PURPOSES—The Purposes of this Act are—

- (1) to establish a fair and effective alternative means by which employees and covered employers may have an increased likelihood of resolving both alleged overt and subtle forms or acts of discrimination without the necessity of the employee taking some form of legal action against the employer,

(2) in accordance with the various public policies encouraging the use of mediation, to make mediation available at an early stage of an employment dispute, thus:

(A) possibly reducing economic and noneconomic costs,
(B) preserving the employment relationship and decreasing acrimony, and
220 Arbitration 2007

(C) decreasing the filing of a number of formal discrimination complaints, charges, and lawsuits and further burdening our public justice system, and

(3) to provide that the participation in mediation shall not preclude either the employee-disputant or covered employer-disputant from having access to the public justice system.

SECTION 3. AMENDMENTS TO TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

(a) FEDERAL EMPLOYEES—Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) is amended—

(1) in section 706(a) by inserting after the 7th sentence the following:

‘Regardless of whether the Commission makes an investigation under this subsection, the Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.’, and

(2) in section 711(a) by adding at the end of the following:

‘Every employer, employment agency, and labor organization shall provide to each employee and each member, individually, a copy of the materials required by this section to be so posted.’

(b) OFFICE OF FEDERAL CONTRACT COMPLIANCE—Section 718 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-17) is amended—

(1) By inserting ‘(a)’ after ‘SEC. 718’, and

(2) By adding at the end the following:

‘(b) The Office of Federal Contract Compliance shall endeavor to responsibly address and resolve any alleged discrimination using mediation with respect to which this section applies.

‘(c) An employer who establishes, implements an approved internal conflict management program or system providing the use of a certified mediator participates in mediation under this section shall be given preferred status in contract bidding for additional and for maintaining current Federal Government contracts.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

‘(d) An employer who is a party to a Government contract or the agency of the United States shall assume the costs of mediation under this section, including the fees of the mediator and any travel and lodging expenses of the employee, if such travel exceeds 25 miles, one way. Any settlement shall include, among other things, any appropriate and reasonable attorney fees.

‘(e) Retaliation by an employer who is a party to a Government contract or the agency of the United States, or the destruction of evidence, shall result in the imposition of appropriate civil or criminal sanctions. The participation in mediation shall be at the option of the employee. The participation in mediation shall not preclude the employee’s access to any State, local, or Federal EEO enforcement agency or any State or Federal court.

‘(f) The Office of Federal Contract Compliance shall have authority over employers who are parties to Government contracts that fail to comply with this section. Failure to comply shall result in the loss of a current Government contract and disqualification from consideration for future Government contracts.

‘(g) No resolution by the disputants may contravene the provisions of a valid collective bargaining agreement between an employer who is part to a Government contract and a labor union or certified bargaining representative. Any voluntary settlement outcome and agreement may not be in conflict with the collective bargaining agreement.’

SECTION 4. AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) is amended—

(1) in section 7(e) by inserting after the 2d sentence the following:

‘The Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.’, and

(2) in section 8 by adding at the end the following:

‘Every employer, employment agency, and labor organization shall provide to each employee and each member, individually, a copy of the materials required by this section to be so posted.’

SECTION 5. AMENDMENT TO AMERICANS WITH DISABILITIES ACT OF 1990.

Section 107(a) of the American with Disabilities Act of 1990 (42 U.S.C. 12117(a)) is amended by adding at the end the following:

‘The Commission shall provide counseling services regarding, and endeavor to responsibly address and resolve, claims of unlawful discrimination using certified contract mediators.’

SECTION 6. MEDIATION.

(a) **DEFINITIONS**—For purposes of this section:

(1) The term ‘employer’ means any Federal agency (including Federal courts) or business enterprise receiving Federal funds of \$200,000 or greater or having 20 or more employees.

(2) The term ‘mediator’ means any neutral, third-party, including an attorney and a non attorney, who is trained in the mediation process and has a demonstrable working knowledge in relevant EEO and employment law, including a third party who is—

(A) appointed or approved by a competent court, the Equal Employment Opportunity Commission, a certified mediation center, or a university, or

(B) jointly chosen by the disputants.

(3) The term ‘trained mediation professional’ means a person who—

(A) has participated in employment mediation training of 40 or more hours, or

(B) has co-mediated with or been supervised by another trained certified mediation professional for at least three employment or contract dispute cases of no fewer than 15 hours.(4) The term ‘certified mediation center’ includes any private or public entity that is qualified to facilitate the employment or contract mediation process and provide training on employment and contract dispute resolution, including, but not limited to, the American Arbitration Association, the American Bar Association, the Center for Employment Dispute Resolution, CPR Conflict Institute, JAMS/Endispute, United States Arbitration and Mediation, Inc., Institute on Conflict Resolution at Cornell University, and the Society of Professionals in Dispute Resolution.

(b) **REQUIREMENTS**—(1) All employers shall—

(A) establish an internal dispute resolution program or system that provides, as a voluntary option, employee-disputant access to external third-party certified mediators,

(B) participate in mediation if the employee has exhausted the internal dispute resolution program or system and has formally requested mediation without the filing of a charge or lawsuit, and

(C) participate in mediation if the claimant has filed a charge or lawsuit and the claimant formally requests mediation.

THE PROPOSED NATIONAL EMPLOYMENT DISPUTE RESOLUTION ACT

- (2) While the mediation settlement outcome would be voluntary, the employer shall participate in mediation where the employee-disputant has expressed a desire to mediate.
 - (3) Under all circumstances, the employee-disputant is entitled to legal representation.
 - (4) Employers shall inform employee-disputants of the mediation alternative and their respective rights thereof, and the employee-disputant would have 30 days in which to decide whether to participate in mediation.
 - (5) When an employee-disputant voluntarily agrees to participate in the mediation process, any applicable statute of limitations shall be tolled, and the private tolling agreement shall be enforceable in any court of competent jurisdiction.
 - (6) The employee and employer disputants shall not have more than 90 days within which to resolve the dispute.
 - (7) Should mediation prove unsuccessful, the employer shall again inform the employee-disputant of their rights, in writing, including the right to pursue the matter under any applicable State, county, local ordinance, or Federal statutes.
 - (8) Consistent with section 705 of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission, and any State or local authority involved in proceedings described in section 706, shall offer technical assistance to any unrepresented or self-represented party, provided that a formal complaint has been filed with the Commission or such authority. Such assistance shall include, but not be limited to—
 - (A) pre-mediation counseling,
 - (B) assistance in understanding the status of relevant case law,
 - (C) assistance in what would be the appropriate remedy if the instant claim were to be found to have merit, and
 - (D) assistance in drafting any post-mediation settlement agreement or resolution.
 - (9) Submission of a claim for mediation shall not preclude either the claimant or respondent from seeking other appropriate relief on that claim, except that neither party shall seek other relief until the mediation process has concluded.
 - (10) Any settlement as a result of the mediation process shall be strictly voluntary and remain confidential except for research and evaluation purposes.
 - (11) In every case, the privacy, privilege, and confidentiality of all parties to the dispute shall be preserved, including complaint intake personnel and mediation consultations.
- (c) ATTORNEY'S OBLIGATION TO ADVISE CLIENTS OF

MEDIATION—For the purposes of this Act and all of the other related statutes, attorneys and consultants are legally obliged to advise their clients of the existence of the mediation alternative and their obligations under the Act to participate in mediation in “good faith.”

(d) JUDICIAL ENFORCEMENT—Either party to a mediation agreement to bring an action of enforcement in a Federal district court of competent jurisdiction, however any matter discussed or material presented during mediation shall not be used in any subsequent local, State, or Federal administrative or court proceeding. The confidential provisions of any internal conflict management program or system or agreement to mediations shall be immune from attack by any third party.